

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

3 WSOU INVESTMENTS LLC \* September 8, 2023  
\*  
4 VS. \* CIVIL ACTION NOS.  
\*  
5 GOOGLE LLC \* 6:20-572, 580, 584, 585

BEFORE THE HONORABLE ALAN D ALBRIGHT  
PRETRIAL CONFERENCE

## APPEARANCES:

9 For the Plaintiff: Joseph M. Abraham, Esq.  
10 Timothy Franklin Dewberry, Esq.  
Folio Law Group PLLC  
13492 Research Blvd, Ste. 120, #177  
Austin, TX 78750

12 Alden K. Lee, Esq.  
Folio Law Group PLLC  
1200 Westlake Ave. N. Ste. 809  
13 Seattle, WA 98109

14 Mark Siegmund, Esq.  
15 Craig D. Cherry, Esq.  
16 Justin Wayne Allen, Esq.  
17 Melissa Samano Ruiz, Esq.  
Cherry Johnson Siegmund James, PLLC  
The Roosevelt Tower  
400 Austin Avenue, 9th Floor  
Waco, Texas 76701

21 For the Defendant: Tharan Gregory Lanier, Esq.  
22 Jones Day  
1755 Embarcadero Road  
Palo Alto, CA 94303

1 Rita J. Yoon, Esq.  
2 Jones Day  
3 555 California Street  
4 Ste 26th Floor  
5 San Francisco, CA 94104

6 Michael E. Jones, Esq.  
7 Shaun William Hassett, Esq.  
8 Potter Minton PC  
9 110 N College, Suite 500  
10 Tyler, TX 75702

11 Court Reporter: Kristie M. Davis, CRR, RMR  
12 PO Box 20994  
13 Waco, Texas 76702-0994  
14 (254) 340-6114

15  
16 Proceedings recorded by mechanical stenography,  
17 transcript produced by computer-aided transcription.  
18  
19  
20  
21  
22  
23  
24  
25

09:02 1 (Hearing begins.)

09:02 2 DEPUTY CLERK: Court calls Waco

09:02 3 20-CV-572, 580, 584, 585, WSOU Investments LLC versus

09:03 4 Google LLC for a pretrial conference.

09:03 5 THE COURT: Mr. Siegmund, if I could have

09:03 6 announcements from the plaintiffs.

09:03 7 MR. SIEGMUND: Yes, Your Honor. Good

09:03 8 morning, Your Honor. Mark Siegmund on behalf of

09:03 9 plaintiff Brazos. And with me this morning from the

09:03 10 Folio Law Group is Joe Abraham, Tim Dewberry, and Alden

09:03 11 Lee.

09:03 12 And then with my firm, we have Greg Love,

09:03 13 Justin Allen, Melissa Ruiz, Craig Cherry, and Ryan

09:03 14 Johnson, as well as Scott Maynard, general counsel for

09:03 15 WSOU.

09:03 16 And we're ready to proceed, Your Honor.

09:03 17 THE COURT: Welcome, everyone.

09:03 18 And Mr. Jones?

09:03 19 MR. JONES: Your Honor, Mike Jones for

09:03 20 the defendant Google. Together with Greg Lanier, Tracy

09:03 21 Stitt, Rita Yoon, Edwin Garcia, and Mr. Shaun Hassett.

09:03 22 And here today from Google itself is

09:03 23 Mr. Charlie Steinberg.

09:03 24 And we're ready to proceed, Your Honor.

09:03 25 Thank you, sir.

09:03 1 THE COURT: Very good.

09:03 2 Let me start -- I think we have a number

09:03 3 of motions where argument is not requested, and I will

09:03 4 go through and rule on those.

09:03 5 But let me -- I'm going to go slowly on

09:04 6 the first one to make sure I have the right list and

09:04 7 it's not contested. I have Brazos' Motion For Summary

09:04 8 Judgment Concerning Google's Affirmative Defenses. I

09:04 9 have that as not contested, correct?

09:04 10 Okay. Then I'm on the right page.

09:04 11 That's denied.

09:04 12 Google's Motion to Dismiss for Failure to

09:04 13 State a Claim Under 12(b)(6), that is denied.

09:04 14 Google's Motion for Partial Summary

09:04 15 Judgment of Noninfringement is denied.

09:04 16 Google's Motion for Summary Judgment of

09:04 17 Indefiniteness is denied.

09:04 18 Google's Motion for Summary Judgment of

09:04 19 Patent Ineligibility is denied under Alice Step 1.

09:04 20 Google's Motion to Exclude Testimony of

09:04 21 WSOU's Technical Expert -- is it Tibor?

09:04 22 MR. ABRAHAM: Tibor Kozek.

09:04 23 THE COURT: -- Dr. Tibor Kozek is denied.

09:04 24 Brazos' Motion for Summary Judgment

09:04 25 Concerning Google's Affirmative Defenses is denied.

09:04 1 Google's Motion to Dismiss for Failure to  
09:04 2 Claim -- State a Claim Under 12(b) (6) is denied.

09:04 3 Google's Motion for Partial Summary  
09:05 4 Judgment Under 35 United States Code Section 287 is  
09:05 5 granted.

09:05 6 And Google's Motion for Summary Judgment  
09:05 7 of Invalidity of U.S. Patent No. 8,737,961 is denied.

09:05 8 Also, I have -- okay. Now I have -- the  
09:05 9 next motion I have up, and my understanding is that  
09:05 10 argument is requested, has to do with Google's Motion  
09:05 11 to Strike and Exclude Certain Opinions of Technical  
09:05 12 Expert Tamas or Tamas -- is it Tamas?

09:05 13 MR. ABRAHAM: Tamas.

09:05 14 THE COURT: -- Tamas Budavári.

09:05 15 And I will hear from Google on that.

09:05 16 Good morning.

09:05 17 MR. LANIER: Thank you, Your Honor. Good  
09:05 18 morning.

09:05 19 THE COURT: Welcome back.

09:05 20 MR. LANIER: Thank you, sir.

09:05 21 THE COURT: Have you appeared in Austin  
09:05 22 before?

09:05 23 MR. LANIER: Yes. We had a pretrial  
09:05 24 conference for our last trial here in this room.

09:05 25 Let me just grab my glasses, Your Honor.

09:06 1 Your Honor, if I may, if I may ask one  
09:06 2 question about one of the rulings on the instant  
09:06 3 motions that Your Honor just went through.

09:06 4 THE COURT: Uh-huh.

09:06 5 MR. LANIER: Our Motion 1, Docket 160 in  
09:06 6 the 580 case, partial summary judgment of  
09:06 7 noninfringement --

8 THE COURT: Yes.

09:06 9 MR. LANIER: -- that's about [REDACTED]

09:06 10 [REDACTED]  
11 THE COURT: Yes.

09:06 12 MR. LANIER: Now, the parties -- I'm  
09:06 13 going to confirm on the record that [REDACTED]  
09:06 14 [REDACTED] is not accused of infringement in this case.

09:06 15 THE COURT: Yes, sir. That's what I  
09:06 16 have.

09:06 17 MR. LANIER: All right. Just want to  
09:06 18 make sure there's no dispute about that and that we  
09:06 19 understand the Court's ruling.

09:06 20 THE COURT: And that is what I have as  
09:06 21 well. Yes, sir.

09:06 22 MR. LANIER: All right. Thank you, Your  
09:06 23 Honor.

09:06 24 All right. So, Mr. Rudd, if we could  
09:06 25 pull up the deck that starts with summary judgment of

09:06 1 noninfringement in the 585 case, but we'll jump to  
09:06 2 Slide 20.

09:06 3 Might have to do a magic step to make it  
09:07 4 pop up here, Your Honor. Apologies.

09:07 5 While they're sorting that out, Your  
09:07 6 Honor, perhaps an introductory comment might be  
09:07 7 helpful.

09:07 8 The 585 case involves the '961 patent, so  
09:07 9 we'll occasionally say one or the other. We're talking  
09:07 10 about the '961 patent. This patent shouldn't be going  
09:07 11 to trial for two reasons. They're related, but they're  
09:07 12 independent.

09:07 13 One is that the expert's theory on which  
09:07 14 WSOU now relies was new, never disclosed before expert  
09:07 15 report, should be excluded. And without that, they  
09:07 16 don't have an infringement case.

09:07 17 Alternatively, relatedly but  
09:07 18 alternatively, the motion for summary judgment is  
09:07 19 directed to the theory, assuming -- we listen to it,  
09:07 20 assuming we credit it and the Court doesn't exclude it.

09:07 21 We could proceed in either order, but  
09:07 22 this is the order we had. And we'll talk about why we  
09:07 23 shouldn't be hearing that new theory at all.

09:07 24 And while they're still figuring that  
09:07 25 out, I'll just start to illustrate the points for Your

09:07 1 Honor. My apologies.

09:08 2 Oh, it's up on the big screen. I  
09:08 3 apologize.

09:08 4 Thank you. I just couldn't see it.

09:08 5 You can go to the next slide.

09:08 6 Your Honor, this is one where the  
09:08 7 timeline tells the tale. And if -- with the Court's  
09:08 8 indulgence, I'm just going to take a moment and walk  
09:08 9 through the timeline of this case.

09:08 10 In the '961 case, this patent relates to  
09:08 11 identifying where users are at a particular point.  
09:08 12 It's a specifically claimed set of method steps.  
09:08 13 There's also an apparatus claim. And then it delivers  
09:08 14 a service at some point.

09:08 15 Now, plaintiffs in this case from the  
09:08 16 first day of this case accused something called  
09:08 17 [REDACTED]. And we've illustrated here on the timeline  
09:08 18 that that language appears in their complaint.

09:08 19 [REDACTED] was in their final infringement contentions,  
09:08 20 the first ones. It was in updated contentions. It was  
09:08 21 in representations to this Court. And we've put all  
09:08 22 that in the papers.

09:08 23 But the point of this timeline, Your  
09:08 24 Honor, is that from the first day of filing this case,  
09:08 25 through the close of discovery, WSOU was alleging

09:09 1 its -- that Google's [REDACTED] technology was accused  
09:09 2 and that the accused products infringe because of

09:09 3 [REDACTED]  
09:09 4 [REDACTED].

09:09 5 And Your Honor may recall that there was  
09:09 6 some discussion of that at the claim construction  
09:09 7 hearing. And the Court indicated: I know what  
09:09 8 [REDACTED] is. We all know what [REDACTED] is.

09:09 9 That was their accusation from the very  
09:09 10 beginning of this case.

09:09 11 Fact discovery closed in March of 2023.  
09:09 12 And then the Budavári report, Tamas Budavári. An  
09:09 13 astrophysicist is an expert in this case for some  
09:09 14 reason we don't fully understand, but if we have to,  
09:09 15 we'll talk to him about that at trial.

09:09 16 But he doesn't mention [REDACTED]. He  
09:09 17 accuses something different than [REDACTED]. He  
09:09 18 explains that [REDACTED] isn't relevant, and WSOU  
09:09 19 eventually confirms in briefing here that it abandoned  
09:09 20 the [REDACTED] theory.

09:09 21 So this is the summary of it, and I'll  
09:10 22 show Your Honor a couple of specific pieces. None of  
09:10 23 these facts are disputed. They said [REDACTED]  
09:10 24 [REDACTED]. I can't even say [REDACTED]  
09:10 25 enough times to indicate how many times they said it.

09:10 1 They came up with an entirely new theory in their  
09:10 2 expert report.

09:10 3 Let's go to the next slide.

09:10 4 Just so it's crystal clear, in their  
09:10 5 infringement contentions, they specifically reference

09:10 6 [REDACTED]. This is a reference to the cover page of  
09:10 7 their infringement contentions, which are at Docket  
09:10 8 173-1, referencing [REDACTED] a couple of places here.  
09:10 9 These are the contentions under which we are operating  
09:10 10 in this case.

09:10 11 Now, let's go to the next slide.

09:10 12 Your Honor may recall that there was a  
09:10 13 period of -- about a year ago where -- that WSOU said,  
09:10 14 we need to reset these cases. We're going to amend our  
09:10 15 infringement contentions. We said, you shouldn't get  
09:10 16 to do that. There was a dispute over whether they  
09:10 17 should have leave to amend. The Court granted them  
09:10 18 leave to amend, but it was disputed.

09:10 19 And in asking for that leave to amend,  
09:11 20 here we have in their disputed motion, opposed motion  
09:11 21 at Docket 107 at 14, they are indicating that in this  
09:11 22 case they want to amend their contentions by clarifying  
09:11 23 that Brazos' infringement allegations directed to  
09:11 24 Google's [REDACTED] instrumentalities also include at  
09:11 25 least Google Maps and Google Ads, and they go on.

09:11 1 But again, in asking this Court for  
09:11 2 permission to proceed forward based on the amended  
09:11 3 infringement contentions, they said it's [REDACTED].  
09:11 4 But there's more.

09:11 5 Let's look at the next slide.

09:11 6 There's a couple of letters. They're  
09:11 7 Exhibit 5 and Exhibit 6 to Docket 173 in this case.  
09:11 8 They're discovery letters that we sent back and forth  
09:11 9 to each other. These are two letters from Mr. Love  
09:11 10 right over there, and he talks about [REDACTED] again,  
09:11 11 involves Google's use of [REDACTED] capabilities,  
09:11 12 Google's [REDACTED] in content delivery capabilities.

09:11 13 Again, this was their theory from the beginning.

09:12 14 Now, let's get to the theory they're  
09:12 15 pursuing now. That's the next slide, Slide 25.

09:12 16 Doctor -- this is from Dr. Budavári's  
09:12 17 report. It is Docket 173-6, Paragraphs 59 and 60.

09:12 18 Apologies for that, Your Honor.

09:12 19 And this is his specific accusation and  
09:12 20 analysis in this case, after the close of fact  
09:12 21 discovery, where he accuses something called [REDACTED].

09:12 22 It's actually named after the creature, and then they  
09:12 23 came up with what those letters meant afterwards. But  
09:12 24 they accuse something called [REDACTED]

09:12 25 [REDACTED].

09:12 1 And then he says: In my opinion, [REDACTED]

09:12 2 [REDACTED]

09:12 3 [REDACTED]

09:12 4 [REDACTED].

09:12 5 So that's -- that is the accusation that  
09:12 6 Dr. Budavári is making.

09:12 7 Now, it's wrong and he doesn't support  
09:12 8 it. That's the other motion if we need to get there.  
09:12 9 But that's the accusation.

09:12 10 Now, WSOU essentially says, well, it's  
09:12 11 still [REDACTED] [REDACTED]. It's the same  
09:13 12 thing. There's nothing new here.

09:13 13 But we know unequivocally that is not  
09:13 14 true, and we know that from the best source,  
09:13 15 Dr. Budavári himself.

09:13 16 And that's on the next slide, Slide 26.

09:13 17 And here he's asked by my partner,  
09:13 18 Ms. Stitt over there: Were you ever asked to provide  
09:13 19 any opinions that [REDACTED]  
09:13 20 infringes the asserted claims of the '961 patent?

09:13 21 His answer was telling: Again,

09:13 22 [REDACTED] [REDACTED]

09:13 23 [REDACTED] [REDACTED]

09:13 24 [REDACTED]

09:13 25 [REDACTED] [REDACTED]

09:13 1 [REDACTED]

09:13 2 Dr. Budavári in deposition, after his

09:13 3 expert report is served, is saying, I am not talking

09:13 4 about [REDACTED] [REDACTED]

09:13 5 [REDACTED]

09:13 6 So WSOU's lawyers say in their papers,

09:13 7 and I'm sure we'll hear in a few minutes, that, well,

09:13 8 [REDACTED], it's just code for a broad range of things

09:13 9 where really we're just narrowing and focusing the

09:14 10 allegations of infringement. That's the lawyers

09:14 11 talking. The expert says [REDACTED]

09:14 12 [REDACTED].

09:14 13 So the expert, who's supposed to be

09:14 14 speaking from the perspective of one of skill in the

09:14 15 art, understanding what these terms mean, telling us

09:14 16 what his infringement accusation is, says, it's not

09:14 17 [REDACTED].

09:14 18 And there's a reason it's not [REDACTED].

09:14 19 And we see that in briefing in this case.

09:14 20 The next slide, please, Slide 27.

09:14 21 This is from their opposition, and it's

09:14 22 at Docket 193, Pages 4 to 5.

09:14 23 And what they explain is that

09:14 24 Dr. Budavári got information in discovery and offered a

09:14 25 different theory. And again, this isn't a question of

09:14 1 narrowing [REDACTED] or explaining it. The evidence  
09:14 2 that he got suggested that the -- [REDACTED]  
09:14 3 [REDACTED]  
09:15 4 [REDACTED].  
09:15 5 [REDACTED]  
09:15 6 [REDACTED]  
09:15 7 [REDACTED].  
09:15 8 So the expert says, I didn't even look at  
09:15 9 [REDACTED]. The lawyers say that's because we  
09:15 10 discovered in discovery, what's based on facts,  
09:15 11 [REDACTED] wasn't it. And that's the theory that's  
09:15 12 offered for the very first time in the expert report.  
09:15 13 And there is no question that the  
09:15 14 specific accusation of infringement that Dr. Budavári  
09:15 15 makes on Elements, essentially, 1[c] and 1[d], that  
09:15 16 we've cited here about [REDACTED], was not  
09:15 17 the basis of their final infringement contentions,  
09:15 18 everything was [REDACTED]. And the first time it shows  
09:15 19 up is in the expert report. First time after the close  
09:15 20 of fact discovery.  
09:15 21 Now, this didn't have to happen this way.  
09:15 22 We'd reset these cases more than once, as Your Honor  
09:15 23 knows. They've been around for a little bit. We're on  
09:15 24 our third set of lead counsel.  
09:15 25 We could have said, hey, we discovered

09:15 1 that we have a different theory. We need to amend.

09:16 2 We might have opposed it because we've  
09:16 3 been doing this a long time, but the Court would have  
09:16 4 had that opportunity to make the choice, do I let them  
09:16 5 change their theory? We could have been heard on that  
09:16 6 question and maybe a new prejudice could have been  
09:16 7 mitigated; but now we are, less than a month before  
09:16 8 trial, litigating a theory that was disclosed after the  
09:16 9 close of fact discovery, disclosed for the first time  
09:16 10 in the expert report, that the expert said isn't the  
09:16 11 old theory and where the lawyers said the old theory  
09:16 12 didn't work.

09:16 13 So now they don't have an infringement  
09:16 14 theory. Separate issue again, we can talk about  
09:16 15 whether this new theory even flies.

09:16 16 Let's go to the next slide.

09:16 17 Your Honor's dealt with this more than  
09:16 18 once. We've cited one case, this is the Tomax AS  
09:16 19 versus Turbo Drill Industries case.

09:16 20 This is prejudice. We have been  
09:16 21 prejudiced by this. We have litigated a different  
09:16 22 case.

09:16 23 We do not know what different prior art  
09:16 24 we might have offered. We do not know what different  
09:16 25 evidence we might have looked for, what different

09:17 1 questions we might have asked in discovery if we were  
09:17 2 talking about these specific infringement accusations  
09:17 3 and not the geofencing that was the case, even over  
09:17 4 disputes, until their expert report.

09:17 5 That sums it up, Your Honor, and I'll  
09:17 6 take a minute or two to respond, if necessary, after  
09:17 7 they talk. Thank you.

09:17 8 THE COURT: Response?

09:17 9 MR. ABRAHAM: Thank you for your  
09:18 10 patience, Your Honor.

09:18 11 THE COURT: You're welcome.

09:18 12 MR. ABRAHAM: Working with technology.  
09:18 13 All right. Few things here. Your Honor  
09:18 14 is well familiar with the law. The purpose of  
09:18 15 infringement contentions is to put the accused  
09:18 16 infringer on notice of a theory. It is not intended to  
09:18 17 marshal all evidence on which you may rely. And I  
09:18 18 think what we end up having here is a difference --  
09:18 19 it's a dispute that is focused on labels rather than  
09:18 20 substance.

09:18 21 At the end of the day, what is in  
09:18 22 Dr. Budavári's report as support for the theory of  
09:18 23 infringement that he presents there is consistent with  
09:18 24 the theory of infringement to which we pointed Google  
09:18 25 in our amended infringement contentions back in April

09:18 1 of 2022. And at the end of the day, that's really  
09:18 2 about all there is.

09:18 3 I can walk through a few specifics, but  
09:18 4 what Google has not really pointed to -- yes, they've  
09:18 5 pointed to the statement from the Tomax case, that  
09:18 6 having to face a new theory is prejudice, but they  
09:18 7 haven't pointed to anything other than waving their  
09:18 8 hands about, oh, we might have asked some different  
09:19 9 questions in discovery or we might have pursued a  
09:19 10 different infringement theory as our invalidity theory.  
09:19 11 There's no specifics there.

09:19 12 So let me skip through. Very briefly, I  
09:19 13 just want to make sure that we are centered.

09:19 14 Dr. Budavári is very clear that this case  
09:19 15 has been about Google Maps. Google does not appear to  
09:19 16 contest that at this point, though they may bring that  
09:19 17 up at some points later in the proceedings.

09:19 18 But again, they're complaining that  
09:19 19 Brazos has narrowed the case relative to -- to where we  
09:19 20 were. And that's something that happens a lot. That's  
09:19 21 something that, you know, the Court wants to see. We  
09:19 22 want to focus disputes as we get closer to trial so  
09:19 23 that we have a finely tuned set of facts that we are  
09:19 24 asking the jury to rule on.

09:19 25 (Off-the-record bench conference.)

09:20 1 THE COURT: I don't think I need --  
09:20 2 I'm -- with regard to the issue of the argument from  
09:20 3 Google that I need to strike or grant summary judgment,  
09:20 4 or whatever it is, with regard to the new infringement  
09:20 5 theories, I'm going to deny that.

09:20 6 The -- actually, the issue, if I could  
09:20 7 hear from Google on, that I'm most interested in is the  
09:20 8 issue concerning technical comparability. If you'll  
09:20 9 make an argument on that, and then I'll hear from  
09:20 10 plaintiff on that.

09:20 11 MR. ABRAHAM: Thank you, Your Honor.

09:20 12 MR. LANIER: Thank you, Your Honor.

09:21 13 THE COURT: And to speak more broadly,  
09:21 14 the issue I -- I'm sorry.

09:21 15 MR. SIEGMUND: I was just going to ask  
09:21 16 for that clarification, Your Honor. That's all.

09:21 17 THE COURT: Of the multifarious motion to  
09:21 18 strike, the issue I care about hearing on -- the only  
09:21 19 issue I care about hearing argument on is the technical  
09:21 20 comparability.

09:21 21 MR. LANIER: Thank you, Your Honor.

09:21 22 And just so it's clear, we understand the  
09:21 23 Court's ruling on the motion to strike. We do have a  
09:21 24 noninfringement argument, even assuming that theory, on  
09:21 25 which we would like to be heard. That's a separate

09:21 1 motion.

09:21 2 THE COURT: That's a separate motion.

09:21 3 MR. LANIER: Yes, Your Honor. Just so  
09:21 4 it's clear about that, and we understand the Court's  
09:21 5 ruling.

09:21 6 THE COURT: I'm ruling on -- I'm going  
09:21 7 to -- with respect to the issue of whether it's new and  
09:21 8 shouldn't come in because it's new, I'm overruling  
09:21 9 that.

09:21 10 With respect to the issue of the  
09:21 11 misquoted claim language, I'm denying that.

09:21 12 With regard to the issue on ipse dixit,  
09:21 13 I'm denying that, primarily because I don't know what  
09:21 14 ipse dixit means.

09:21 15 But I do care about hearing on technical  
09:22 16 comparability.

09:22 17 MR. LANIER: I understand, Your Honor.  
09:22 18 Well, ipse dixit essentially means, if I say it, it  
09:22 19 must be so. Right? I know Your Honor knows.

09:22 20 (Laughter.)

09:22 21 MR. LANIER: But that actually again  
09:22 22 comes up in the summary judgment of noninfringement.  
09:22 23 So we'll be back to that.

09:22 24 So, Your Honor, on technical  
09:22 25 comparability, the real problem is that Dr. -- the

09:22 1 damages experts rely on alleged technical comparability  
09:22 2 assessments, but Dr. Budavári didn't actually do any  
09:22 3 comparisons to [REDACTED]  
09:22 4 [REDACTED]. It's not disputed.

09:22 5 So I think Exhibit 7 to our motion here  
09:22 6 at Pages 196 to 201.25, he doesn't do an actual  
09:22 7 infringement analysis. What he does is he says, I'll  
09:22 8 compare some aspects of the patents to aspects of the  
09:22 9 products.

09:22 10 But to opine on technical comparability,  
09:22 11 you have to do more than that because it's not  
09:22 12 technical -- it's got to be relevant to the patents.  
09:22 13 You have to anchor it in the patents. And he  
09:22 14 doesn't -- he doesn't actually do that kind of an  
09:22 15 analysis.

09:23 16 Additionally, when he's trying to exclude  
09:23 17 the relevance of other patents and things like that,  
09:23 18 his standard is way too stringent. So he's operating  
09:23 19 with inconsistent standards. He doesn't provide a  
09:23 20 reliable basis on which a damages expert could rely on  
09:23 21 to assess technical comparability, either to include  
09:23 22 something or exclude something. He uses inconsistent  
09:23 23 standards, and he doesn't apply them, either of them,  
09:23 24 fully with any rigor at all.

09:23 25 This report is essentially all ipse

09:23 1 dixit. We'll talk about that on summary judgment of  
09:23 2 noninfringement. That's especially so with technical  
09:23 3 comparability. That's really the argument in a  
09:23 4 nutshell, Your Honor.

09:23 5 THE COURT: Okay. Response?

09:23 6 MR. ABRAHAM: Your Honor, with respect to  
09:24 7 the technical comparability issue, Google is  
09:24 8 essentially trying to put Brazos in a vice. If  
09:24 9 Dr. Budavári had not offered any opinions on technical  
09:24 10 comparability, they would have accused our damages  
09:24 11 expert, Mr. Blok, of operating without sufficient  
09:24 12 foundation.

09:24 13 We agree the Federal Circuit has made it  
09:24 14 very, very clear that if a damages expert is seeking to  
09:24 15 rely on allegedly comparable licenses, there must be a  
09:24 16 technical foundation. We're well aware of that, and  
09:24 17 the -- Dr. Budavári and Mr. Blok worked together to go  
09:24 18 over these particular [REDACTED] that Dr. Budavári  
09:24 19 uses as the basis for his technical comparability  
09:24 20 opinion.

09:24 21 And let's focus on that specifically.

09:24 22 These are [REDACTED]. This is not a question of  
09:25 23 Dr. Budavári having plucked something from a completely  
09:25 24 random other industry. That's the cardinal sin that  
09:25 25 the comparable license jurisprudence is really directed

1 to, where you can't find any alleged comparison or  
2 point of reference between the underlying allegedly  
3 comparable license and then the accused technology.

4 Here, Dr. Budavári -- Google -- sorry.

5 | Let me back up.

10 [REDACTED], there was an allocation of  
11 revenue. There is no similar set allocation of revenue  
12 of which we've been made aware in discovery that  
13 relates to the specifically accused feature in this  
14 case -- or product and -- product and features in this  
15 case.

19 He took a look at the detailed product  
20 documentation with respect to [REDACTED]

21 [REDACTED], and he said, okay, I see what Google says [REDACTED]  
22 [REDACTED] does, and from what -- and based on how they  
23 describe it, I can see how it relates, to a degree, to  
24 what we're accusing here.

25 And he went through a list of -- I want

09:26 1 to say it was about 20 [REDACTED], and some he said  
09:26 2 were comparable and others he said he didn't. And it's  
09:26 3 explained in his report which ones are comparable and  
09:26 4 why, what he's relying on.

09:26 5 And the point is that, if we -- if there  
09:26 6 is to be a reasonable and reliable comparison,  
09:26 7 Dr. Budavári has to do that work. He explained what he  
09:26 8 did. And I get that Google's going to take issue with  
09:26 9 it. I would be surprised if they didn't. That's their  
09:26 10 job.

09:26 11 But ultimately, any concerns that they  
09:26 12 have about how Dr. Budavári performed that  
09:26 13 comparability analysis are issues for cross. That's  
09:27 14 something that the Federal Circuit has made very, very  
09:27 15 clear. Generally, the degree of comparability goes to  
09:27 16 weight. It doesn't go to whether the opinion gets to  
09:27 17 come in at all.

09:27 18 MR. LANIER: Your Honor, may I briefly  
09:27 19 respond?

09:27 20 THE COURT: Yes, sir. Of course.

09:27 21 My understanding is that the portion of  
09:27 22 the expert report that we're concerned here is in --  
09:27 23 there's a specific section, Paragraphs 208 to 213, and  
09:27 24 I just want to make sure we're dealing with the same --  
09:27 25 I think we're all on the same page, but that's the --

09:27 1 that's the issues of technical comparability.

09:27 2 Am I right about that?

09:27 3 MR. LANIER: You're correct, Your Honor.

09:27 4 THE COURT: Okay. Very good. And I'm

09:27 5 happy to hear a response.

09:27 6 MR. LANIER: Thank you, Your Honor.

09:27 7 So Your Honor's right to focus on those

09:27 8 paragraphs. That's the extent of his analysis.

09:27 9 And what we just heard is really telling.

09:27 10 What apparently was done was maybe a business

09:27 11 comparability or a revenue comparability analysis, but

09:27 12 the features or [REDACTED]

09:28 13 that Dr. Budavári did his comparable -- comparability

09:28 14 analysis on are not accused of infringement.

09:28 15 And the point of that analysis -- of that

09:28 16 comparability analysis is: Would you need a license?

09:28 17 What's the value of a license? Why is a license

09:28 18 comparable?

09:28 19 So unlike the Federal Circuit case where

09:28 20 we might be saying, well, we think you didn't give it

09:28 21 enough weight, we kind of disagree. We'd cross him.

09:28 22 We understand that, Your Honor.

09:28 23 But this isn't a question of degree.

09:28 24 This is a question of quality, not quantity. And the

09:28 25 quality he addressed here was incorrect. That's

09:28 1 fundamentally it.

09:28 2 Google Maps by -- as a whole isn't  
09:28 3 accused. It's made of many pieces. [REDACTED] are  
09:28 4 deployed in many different products. They're not  
09:28 5 accused. [REDACTED] isn't even part of Google Maps.

6 I'm sorry, Your Honor. I didn't mean to  
09:28 7 cut you off.

09:28 8 THE COURT: No, no. And because counsel  
09:28 9 was -- and here's where I -- obviously, it's tough for  
09:28 10 us on this side of the bench to deal with, but  
09:29 11 essentially your argument is that it's not the result  
09:29 12 he got; it's the methodology that he used.

09:29 13 And the problem you have is when you're  
09:29 14 crossing -- counsel would like to say, you -- well, you  
09:29 15 can just cross him on this. But your problem is you  
09:29 16 want to be able to say, you didn't do it right.

09:29 17 MR. LANIER: Correct.

09:29 18 THE COURT: And he's going to say,  
09:29 19 huh-uh. I did do it right. And that's a very  
09:29 20 difficult cross. And that's the point of your Daubert,  
09:29 21 is that he didn't use the right methodology in terms of  
09:29 22 essentially the way he compared the nonaccused  
09:29 23 products, correct?

09:29 24 MR. LANIER: Well said, Your Honor.  
09:29 25 Better than I just said it.

09:29 1                   And really, to put it in a nutshell, what  
09:29 2 he's supposedly doing is saying, Mr. Damages Expert,  
09:29 3 for your damages analysis, thinking about revenues and  
09:29 4 everything else, I think that this license is  
09:29 5 technically comparable to the technology that would be  
09:29 6 licensed in the hypothetical negotiation.

09:29 7                   And he didn't do that. And if we crossed  
09:30 8 him on that, we'd also run into problems like, well,  
09:30 9 wait a minute. Isn't that a Daubert issue? Why do  
09:30 10 they get to do that? He's here. That's the problem we  
09:30 11 have.

09:30 12                   THE COURT: I got it.

09:30 13                   MR. ABRAHAM: Your Honor, may I briefly  
09:30 14 be heard?

09:30 15                   THE COURT: I'm good. I'm going to grant  
09:30 16 the motion.

09:30 17                   Next --

09:30 18                   MR. ABRAHAM: May I say one sentence? I  
09:30 19 will be very brief.

09:30 20                   What I'm hearing from Google is that they  
09:30 21 want him to have conducted an infringement analysis on  
09:30 22 the foundational comparable that he's using. That is  
09:30 23 not the law.

09:30 24                   You can build a damages opinion based on  
09:30 25 something that does not infringe as long as it is

09:30 1 sufficiently comparable.

09:30 2 THE COURT: Okay. The motion's granted.

09:30 3 Next up I have Brazos' Daubert motion to  
09:30 4 exclude damages opinion with respect to Mr. Bakewell.

09:30 5 And I will hear from the plaintiff on  
09:30 6 that, please.

09:30 7 Mr. Siegmund?

09:30 8 MR. SIEGMUND: Mr. Love will be handling  
09:30 9 this, Your Honor.

09:30 10 THE COURT: Okay. Good morning.

09:31 11 MR. LOVE: One second, Your Honor.

09:31 12 THE COURT: Why don't I tell you what I  
09:31 13 care about while y'all are getting that booted up?

09:31 14 My understanding is that there are  
09:31 15 essentially two arguments here: One has to do with  
09:31 16 opinions related to whether or not there's an  
09:31 17 assumption of infringement, and the other has to do  
09:31 18 with reliance on agreements with respect to technical  
09:31 19 or economic comparability, right?

09:31 20 MR. LOVE: Yes, Your Honor.

09:31 21 THE COURT: I just need to hear argument  
09:31 22 on the second one.

09:31 23 MR. LOVE: On the second one?

09:31 24 THE COURT: Yes, sir.

09:31 25 MR. LOVE: Okay. So, Your Honor, if we

09:31 1 can go to --

09:31 2 Ms. Ruiz, if we can go to Slide No. 11.

09:32 3 I'm sorry. No. 12.

09:32 4 So, Your Honor, there's -- there are

09:32 5 three licenses at issue: The Brazos-[REDACTED] license, the

09:32 6 Brazos-[REDACTED] license, and the Brazos-[REDACTED] license.

09:32 7 And Mr. Bakewell, in his report, he

09:32 8 analyzed -- he analyzed these three licenses from an

09:32 9 economic standpoint. But if you look at his report --

09:32 10 Ms. Ruiz, if you'll go to Slide No. 18.

09:32 11 Mr. Bakewell's report contains three

09:32 12 paragraphs with respect to each license agreement, and

09:33 13 I have those before the Court to review.

09:33 14 Paragraph 183 addresses the [REDACTED] license

09:33 15 agreement. And this is the sum total of the

09:33 16 technological comparability analysis that was performed

09:33 17 by Google in the case in its entirety.

09:33 18 This paragraph, and I quote, it says:

09:33 19 [REDACTED]

09:33 20 [REDACTED]

09:33 21 [REDACTED]

09:33 22 That sentence is the only sentence that

09:33 23 addresses the technological comparability of the '961

09:33 24 patent and the products-in-suit -- or the

09:33 25 product-in-suit from Google's perspective and the [REDACTED]

09:33 1 agreement.

09:33 2 The same occurs with respect to the

09:33 3 [REDACTED] agreement and the [REDACTED] agreement. In

09:33 4 Paragraph 197, the [REDACTED] agreement is referenced.

09:33 5 Again, basically the exact same sentence. Paragraph

09:33 6 216 has the exact same sentence with respect to the

09:34 7 [REDACTED] agreements.

09:34 8 Dr. Welch, who is the technical expert

09:34 9 for Google, did not address, in any way, shape, or

09:34 10 form, the technological comparability requirement with

09:34 11 respect to these three licenses and the

09:34 12 products-in-suit or the patent-in-suit.

09:34 13 So Dr. -- I mean, Mr. Bakewell's opinion

09:34 14 with respect to these licenses, there's no foundation

09:34 15 for any technological assessment that was performed by

09:34 16 Google in these cases. And the problem with this --

09:34 17 Next slide, please.

09:34 18 -- is that, you know, the case law

09:34 19 clearly directs that a license is not comparable simply

09:34 20 because it contains the patents-in-suit.

09:34 21 Next slide, please.

09:34 22 And if you look at the MLC Intellectual

09:34 23 Property case, in that case the Federal Circuit looked

09:34 24 at a scenario where the license agreement at issue --

09:34 25 we had the same scenario where you have license

09:35 1 agreement -- agreements that reference the  
09:35 2 patent-in-suit.

09:35 3 In this case, there were 41 patents that  
09:35 4 were subject to the license agreement. In the case at  
09:35 5 hand, in the instant case, we have [REDACTED]  
09:35 6 [REDACTED] and the agreement addresses  
09:35 7 [REDACTED].

09:35 8 THE COURT: Let me ask you this: Am I  
09:35 9 correct that what we're fighting over right now is  
09:35 10 Mr. Bakewell wanting to respond to what I just struck  
09:35 11 of yours?

09:35 12 MR. LOVE: Yes, Your Honor.

09:35 13 THE COURT: So why -- why am I -- why are  
09:35 14 we taking up our time doing that if you're not going to  
09:35 15 be putting on --

09:35 16 Let me ask defense counsel: If the  
09:35 17 plaintiff doesn't put in evidence --

09:35 18 MR. LOVE: Well, I'm sorry, Your Honor.  
09:35 19 It's a separate issue.

09:35 20 THE COURT: Oh, okay.

09:35 21 MR. LOVE: I'm sorry. The -- so the  
09:35 22 issue that was just addressed was the [REDACTED] issue  
09:35 23 within the context of the damages expert opinion with  
09:35 24 respect to a different step of apportionment.

09:36 25 THE COURT: Okay. As long as -- as long

09:36 1 as what Bakewell is talking about isn't just responsive  
09:36 2 to what you all are --

09:36 3 MR. LOVE: I misunderstood the question.

09:36 4 What I thought you were asking was:

09:36 5 Didn't Mr. Lanier just get up here and tell me that  
09:36 6 this analysis had to be anchored in the claim language  
09:36 7 of the patents?

09:36 8 And the answer is: If that is -- if that  
09:36 9 is the law, then Google certainly did not comply with  
09:36 10 that requirement with respect to Mr. Bakewell's view of  
09:36 11 technological apportionment with respect to these three  
09:36 12 license agreements.

09:36 13 And if you want to hear from Google on  
09:36 14 this point.

09:36 15 THE COURT: No, no, no. I'm good. You  
09:36 16 can keep going.

09:36 17 MR. LOVE: Well, Your Honor, that's -- in  
09:36 18 terms of the technological comparability issue,  
09:36 19 that's -- you know, that's it in a nutshell.

09:36 20 With respect to economic comparability,  
09:36 21 Mr. Bakewell performed -- you know, again, he really  
09:36 22 didn't perform an economic comparability in the sense  
09:36 23 that he compared these licenses and the, you know,  
09:37 24 issues involved with the use or the extent of use by  
09:37 25 Google with respect to these -- to this technology.

09:37 1 And, you know, we're willing to stand on  
09:37 2 the briefing on that particular topic, because the  
09:37 3 failure to address the technological comparability  
09:37 4 component, that is what I think closes the door on this  
09:37 5 issue, from our perspective.

09:37 6 THE COURT: Okay. Thank you.

09:37 7 Yes, sir. Mr. Jones.

09:37 8 MR. JONES: Thank you, Your Honor.

09:37 9 I was a little surprised. I think it  
09:37 10 depends on which case we're talking about whether the  
09:37 11 Court's prior ruling makes this moot or not. With  
09:37 12 regard to one of the cases, I would think it does from  
09:37 13 what Mr. Blok did.

09:37 14 So I just say, I have a little bit  
09:37 15 different answer to that question than I think I just  
09:38 16 heard from Mr. Love. But I just point that out to the  
09:38 17 Court and now will turn my attention as the Court  
09:38 18 just -- to the matters at hand with regard to the  
09:38 19 comparabilities of the licenses.

09:38 20 With regard to the comparability of the  
09:38 21 licenses, as the Court pointed out, there are two  
09:38 22 things we need to look at. We need to look at are they  
09:38 23 technically comparable? And, secondly, we need to look  
09:38 24 at whether or not there has been a proper analysis done  
09:38 25 so that you can account for any economic differences

09:38 1 that are there.

09:38 2 In their briefing -- first, I'll deal  
09:38 3 with the technical comparability. In their briefing,  
09:38 4 the plaintiffs take the position that we have no  
09:38 5 authorities that licenses of [REDACTED] should  
09:38 6 be considered.

09:38 7 You know, Your Honor, the Federal Circuit  
09:38 8 has taught us that actual licenses to the patented  
09:38 9 technology are highly probative as to what constitutes  
09:38 10 a reasonable royalty because actual licenses must  
09:38 11 clearly reflect the economic value of the patented  
09:39 12 technology in the marketplace.

09:39 13 To be quite clear, each of the three  
09:39 14 licenses that Mr. Love just talked about includes [REDACTED]

09:39 15 [REDACTED] and includes [REDACTED]  
09:39 16 that will be in question at the time of the  
09:39 17 hypothetical negotiation. They also include [REDACTED]  
09:39 18 [REDACTED]. Certainly, that's true. But they include [REDACTED]  
09:39 19 [REDACTED] that are going to be in question at the  
09:39 20 hypothetical negotiation. That's beyond doubt.  
09:39 21 Everybody agrees to that.

09:39 22 Now, they then say, well, that's not  
09:39 23 enough. The mere fact that these licenses actually  
09:39 24 include [REDACTED]  
09:39 25 [REDACTED]

09:39 1 [REDACTED], that that's not  
09:39 2 enough for technical comparability. And that when  
09:39 3 Mr. Bakewell pointed it -- that out and said they were  
09:39 4 technically comparable, that he did not do enough.

09:39 5 And they cite to three cases that they  
09:40 6 contend say that this should be disregarded because  
09:40 7 [REDACTED] were included in this portfolio  
09:40 8 license. But they certainly do not stand for the  
09:40 9 proposition that's being asserted here.

09:40 10 The first case they cite to is Lucent  
09:40 11 versus Gateway. And in Lucent versus Gateway, they  
09:40 12 don't exclude any licenses. In fact, they say we must  
09:40 13 accept that the licensing agreements and other evidence  
09:40 14 were properly before the Court. Nothing was excluded  
09:40 15 there. It certainly does not stand for this  
09:40 16 proposition.

09:40 17 The next case they cite to is Trell  
09:40 18 versus Marlee Electronics. And what Trell says is that  
09:40 19 a single licensing agreement, without more, is not  
09:40 20 sufficient proof of an established royalty.

09:40 21 That case involved a expert who said,  
09:40 22 under the Georgia-Pacific factors, I am going to say  
09:40 23 that in this case there is an established royalty in  
09:41 24 the marketplace for the patented invention when it's  
09:41 25 licensed as a royalty.

09:41 1                   And they said, look, you can't just look  
09:41 2 at one license agreement like that and come to that  
09:41 3 conclusion. That's the Trell case.

09:41 4                   And then the case they cite to mostly  
09:41 5 in -- the most important case in their briefing, is the  
09:41 6 MLC Intellectual Property case. And that case is  
09:41 7 really an apportionment case. It's not a case where a  
09:41 8 license is excluded because it had more things in it.  
09:41 9 In that case the plaintiff said that they were using a  
09:41 10 comparable license to apportion for nonaccused  
09:41 11 technologies in an infringing patent.

09:41 12                   And they were relying upon Elbit versus  
09:41 13 Hughes, which I know the Court's familiar with, where  
09:41 14 you can use prior settlement agreements for a slightly  
09:41 15 different technology to do apportionment. And the  
09:41 16 Court said, no, you know, this wasn't close enough.  
09:41 17 You can't use this agreement for apportionment.

09:41 18                   But when it was dealing with  
09:41 19 apportionment, you clearly see how you needed more  
09:42 20 technical evidence. But the cases that they cite,  
09:42 21 nowhere, nowhere do they cite a case where [REDACTED]

09:42 22 [REDACTED]  
09:42 23 [REDACTED]  
09:42 24 under a license where that has been found to not be  
09:42 25 technologically comparable. It just makes no sense,

09:42 1 Your Honor.

09:42 2 Then that moves to the second point.

09:42 3 THE COURT: Wait. I think my concern,

09:42 4 and the reason I asked you to look at this, is a

09:42 5 concern about whether or not Mr. Bakewell had actually

09:42 6 adequately disclosed his technical analysis in his

09:42 7 report.

09:42 8 Do you know -- do you have -- are you

09:42 9 facile enough in the report to tell me where he

09:42 10 conducted in his report the technical analysis? I

09:42 11 think that was the complaint --

09:42 12 MR. JONES: I think we're -- I think

09:42 13 we're -- and again, I want to be very clear on this

09:42 14 point, Your Honor. His technical analysis is a fact

09:42 15 that [REDACTED] [REDACTED]

09:43 16 [REDACTED].

09:43 17 And that's his analysis with regard to the technical

09:43 18 component, Your Honor.

09:43 19 THE COURT: Okay.

09:43 20 MR. JONES: What we have here is [REDACTED]

09:43 21 [REDACTED]

09:43 22 [REDACTED].

09:43 23 So he knew by looking at the license

09:43 24 agreement itself that this license agreement includes

09:43 25 [REDACTED] that would be dealt with in the

09:43 1 hypothetical negotiation, and because of that -- and I  
09:43 2 hope it's clear by the case law I just cited to the  
09:43 3 Court -- he didn't need to go any further. There was  
09:43 4 no need for him to go further.

09:43 5 So what about the economic analysis?

09:43 6 What did he do there to show economic comparability?

09:43 7 Well, he did much more than's been cited  
09:43 8 to the Court now. The first thing he did was he  
09:43 9 analyzed the situation of the parties that were  
09:43 10 involved in the [REDACTED] agreement, the [REDACTED] agreement,  
09:43 11 and the [REDACTED] agreement.

09:44 12 Could we go to Slide 3? I'm sorry. And  
09:44 13 go to Slide 3, I think.

09:44 14 No. I'm sorry. I've got the wrong slide  
09:44 15 up there. Let's go to Slide 4, please.

09:44 16 Yeah. He analyzed those agreements and  
09:44 17 he looked at who the defendants -- who the licensees  
09:44 18 were and what kind of companies were and how they would  
09:44 19 relate to the position of Google in this case, and that  
09:44 20 they were making commercial products. He also looked  
09:44 21 at -- and there are other paragraphs in his reports  
09:44 22 where he looked at this, where he looked at the  
09:44 23 standing of the plaintiff in this case and how it  
09:44 24 compared to the license or those cases, and that it  
09:45 25 would be a plaintiff that was not making products.

09:45 1 He also did an analysis of the time  
09:45 2 frame.

09:45 3 And if we could go to Slide 5.

09:45 4 And he looked at the time frame of these  
09:45 5 three agreements, and he discussed the overlapping time  
09:45 6 periods. He discussed the fact that these agreements  
09:45 7 were in [REDACTED], that the hypothetical negotiation was in  
09:45 8 2014, and he analyzed that difference.

09:45 9 He also looked as to the type of  
09:45 10 licenses.

09:45 11 If we go to Slide 6.

09:45 12 And obviously you know you analyze the  
09:45 13 types of licenses for structure issues. And he noted  
09:45 14 that they were all [REDACTED] and he also  
09:45 15 cited evidence to the fact that [REDACTED]  
09:45 16 [REDACTED].  
09:45 17 So he not only analyzed these agreements  
09:45 18 and made sure that they included [REDACTED]  
09:45 19 [REDACTED], but he also did the appropriate economic  
09:45 20 comparisons, Your Honor, to find that they were  
09:45 21 comparative.

09:45 22 Thank you.

09:46 23 THE COURT: Response?

09:46 24 MR. LOVE: Your Honor, the case law is  
09:46 25 fairly clear. Just the fact that [REDACTED] is

09:46 1 included in a license agreement, that does not satisfy  
09:46 2 the technological comparability analysis requirement.  
09:46 3 And that is all that Mr. Bakewell points to, is that  
09:46 4 this is one of -- in his deposition he even testified  
09:46 5 that [REDACTED] were in  
09:46 6 this -- the license agreement -- license agreements  
09:46 7 that he analyzed.

09:46 8 And so even if [REDACTED] was included,  
09:46 9 there's zero analysis. Not from Mr. Bakewell, not from  
09:46 10 Dr. Welch, about the technological comparability of  
09:46 11 whether or not the licenses involve the infringing  
09:46 12 products.

09:46 13 THE COURT: Okay.

09:46 14 (Off-the-record bench conference.)

09:47 15 THE COURT: Thank you for that.

09:47 16 The Court is going to, with respect to  
09:47 17 this motion -- with respect to the first portion,  
09:47 18 exclude opinions, I have it framed that do not assume  
09:47 19 infringement. I'm denying that.

09:47 20 With respect to the second, reliance and  
09:47 21 agreements with no technological or economic  
09:47 22 comparability, I'm going to grant that.

09:47 23 Next up I have Google's motion for  
09:47 24 summary judgment of noninfringement of the '961 patent.  
09:48 25 Let me just go through this real quickly, and I will

09:48 1 hear from Google on that.

09:48 2 MR. LANIER: Thank you, Your Honor.

09:48 3 If we could bring up that slide deck.

09:48 4 And by way of introduction, Your Honor,

09:48 5 some of the things that we'll say in presenting this

09:48 6 motion will sound like are attacks on his opinion in

09:48 7 the motion to strike, but I want to be clear, we

09:48 8 understand the Court's ruling, we're not moving to

09:48 9 strike it. What we're pointing out now is that if the

09:48 10 opinion is admitted --

09:48 11 THE COURT: Got it.

09:48 12 MR. LANIER: -- now that it is, it

09:48 13 doesn't fly. It doesn't meet their burden. And it

09:48 14 can't get better because it has to be entered in his

09:48 15 report.

09:48 16 So the other introductory comment I would

09:48 17 make, Your Honor, is that this isn't one where, you

09:48 18 know, they can get up and say, well, you can just cross

09:48 19 him and point out he didn't do a good job, because the

09:48 20 only things he can -- he has to be limited by his

09:48 21 report. Your Honor is very clear and consistent about

09:48 22 that on all these experts, and his report doesn't do

09:48 23 the job. And he can't do more by making something up

09:48 24 later.

09:49 25 So let's go to the next slide. Just to

09:49 1 set the stage, Your Honor.

09:49 2 There are several asserted claims in the  
09:49 3 '961 patent. There are two independent claims, 1 and  
09:49 4 11, and the relationship matters because 1 is a method  
09:49 5 claim with several specific steps; 11 is an apparatus  
09:49 6 that has to have certain components to perform that  
09:49 7 exact same method.

09:49 8 So we're going to point out our motion is  
09:49 9 based on their failure to meet their burden with  
09:49 10 respect to Claim Elements 1[c] and 1[d] that takes out  
09:49 11 all claims in the case. And independently, they don't  
09:49 12 meet their burden on the apparatus claim, Claim 11, and  
09:49 13 its dependent claim, Claim 14. So that's why we're  
09:49 14 focusing on 1[b] and 1[c]. It takes out everything  
09:49 15 because of the relationship between those two sets of  
09:49 16 claims.

09:49 17 Let's go to the next slide.

09:49 18 So again, Your Honor is aware that this  
09:49 19 patent relates generally to finding people in a  
09:49 20 particular place, determining whether they're there,  
09:50 21 where they've been, delivering services; but it's not  
09:50 22 at that level of generality. There's very specific  
09:50 23 claim language and specific steps, and we've labeled  
09:50 24 them here 1[a], [b], [c], [d], [e]. And for this  
09:50 25 analysis, we are going to focus on Claim Elements 1[c]

09:50 1 and 1[d].

09:50 2 Independently, they have not met their  
09:50 3 burden. Either of these arguments takes out the entire  
09:50 4 set of assertions in this case.

09:50 5 Let's go to the next slide, Slide 3  
09:50 6 (sic).

09:50 7 So here what we've illustrated is Claim  
09:50 8 Element 1[c], and it requires: Incrementing of a count  
09:50 9 for a stationary state associated with the set of one  
09:50 10 or more distinct signal sources at the current time.

09:50 11 So you're counting something. You're  
09:50 12 incrementing it, you're adding to it, and you reach  
09:50 13 certain conclusions based on that in this very specific  
09:50 14 method.

09:50 15 Now, here's one thing that's very  
09:50 16 important to get clear at the outset. The accused  
09:50 17 functionality and the product within which those  
09:50 18 accused functionality is included, Google Maps Mobile,

09:51 19 [REDACTED] [REDACTED],  
09:51 20 but saying it counts a lot of things doesn't do the  
09:51 21 job, as Your Honor is well aware.

09:51 22 You have to say you count the thing  
09:51 23 that's required by this element, and you have to show  
09:51 24 where that happens. That's the expert's job. And  
09:51 25 that's, in a nutshell, what they fail to do here.

09:51 1 Now, let's go to the next slide.

09:51 2 To be very clear here, we are focusing on

09:51 3 the analysis that the expert gave in his report, as

09:51 4 amplified, or as we tried to ask him questions about it

09:51 5 at his deposition, but fundamentally is, as Ms. Stitt

09:51 6 asked him: If you were asked what is the [REDACTED]

09:51 7 [REDACTED] as required by this claim limitation,

09:51 8 what is your answer?

09:51 9 And he says: What's in the report.

09:51 10 But the report doesn't do the job.

09:51 11 Let's go to the next slide, Slide 6.

09:51 12 And this is from Dr. Budavári's report.

09:51 13 It's Paragraph 75. It's in the record.

09:51 14 And what he says is: With regard to

09:51 15 Google Maps -- again, that's Google Maps, now Google

09:52 16 Maps Mobile is really the focus. Not the specific

09:52 17 accused functionalities, but Google Maps.

09:52 18 I note that although a count for a

09:52 19 stationary state associated with a set of one or more

09:52 20 distinct signal sources at the current time -- remember

09:52 21 that phrase -- [REDACTED]

09:52 22 [REDACTED]

09:52 23 [REDACTED]

09:52 24 [REDACTED].

09:52 25 So then we say okay. What are those --

09:52 1 what are those counters? Point to us where -- tell us  
09:52 2 exactly where they are, not, [REDACTED]

09:52 3 [REDACTED] Where is it? Where is it in the code? Where  
09:52 4 is it in the product documentation?

09:52 5 Let's go to the next slide, Slide 7.

09:52 6 Oh, we're there.

09:52 7 And here's what we learned from him.

09:52 8 He's asked: So in your opinion, there are [REDACTED]

09:52 9 [REDACTED] that meet the  
09:52 10 requirements of this claim limitation; is that correct?

09:52 11 And here's what he says. He doesn't say,  
09:53 12 yes. And here's where they are.

09:53 13 He says: [REDACTED]

09:53 14 [REDACTED]

09:53 15 [REDACTED]

09:53 16 [REDACTED] [REDACTED]

09:53 17 [REDACTED].

09:53 18 But he does not confirm. He does not add  
09:53 19 anything to the report. He shouldn't be allowed to add  
09:53 20 to the report. But what he confirms is that his report  
09:53 21 lists [REDACTED] It doesn't actually map the [REDACTED]  
09:53 22 to the required claim element, saying, this is [REDACTED]  
09:53 23 of the specific thing.

09:53 24 Because if we were to go back to the  
09:53 25 claim language, and we'll show it again in a minute,

09:53 1 the claim requires counting of different things.  
09:53 2 Incrementing counts of different things. And he never  
09:53 3 does that mapping. He just says, [REDACTED]  
09:53 4 [REDACTED] That's literally what he says. We just saw  
09:53 5 it.

09:53 6 Let's look at Slide 8.

09:53 7 So now this is what he says in his  
09:53 8 report. This is the closest that Dr. Budavári gets in  
09:53 9 his report to which he must be held by his own  
09:54 10 testimony, as well as the law, that where the count and  
09:54 11 then 1[c] is.

09:54 12 And he says "it may qualify." That's the  
09:54 13 strongest he gets. It might be it. But we are at  
09:54 14 summary judgment now. We're on the verge of trial. It  
09:54 15 has to be better than "may qualify." It has to be, I  
09:54 16 have an opinion and my opinion is this functionality to  
09:54 17 which I can point meets that claim element. And the  
09:54 18 strongest he ever gets is "it may qualify."

09:54 19 Now, this isn't just loose wording or  
09:54 20 anything else. This is a problem with his report. It  
09:54 21 is broad. And as we just saw, it just [REDACTED]  
09:54 22 without tying them.

09:54 23 So we asked him more questions about it.

09:54 24 Let's go to Slide 9.

09:54 25 And this is the kind of question that

09:54 1 you'd expect at deposition and you'd certainly hear at  
09:54 2 trial: So my question to you is, is [REDACTED]  
09:54 3 [REDACTED], in your opinion, does  
09:54 4 that qualify -- does that meet the requirements of the  
09:55 5 [REDACTED] in Claim Element  
09:55 6 1[c]?

09:55 7 That is as tight a question as can be  
09:55 8 asked on exactly this point.

09:55 9 And his answer is: [REDACTED]

09:55 10 [REDACTED] [REDACTED]

09:55 11 [REDACTED]

09:55 12 [REDACTED]

09:55 13 [REDACTED]

09:55 14 [REDACTED] [REDACTED]

09:55 15 [REDACTED]

09:55 16 Obviously that's what we're after.

09:55 17 And he never does it. He doesn't do it.

09:55 18 He can't do it. The most he can say is that there are

09:55 19 [REDACTED] and I believe these things happen. But he

09:55 20 doesn't say, [REDACTED] is 1[c], [REDACTED] is 1[d],

09:55 21 and here's the evidence that that [REDACTED] actually occurs

09:55 22 as required by the claim.

09:55 23 Stopping where he stops is our good

09:55 24 friend ipse dixit, right? He just says it, but he

09:55 25 doesn't show it. He doesn't prove it.

09:55 1 Now, of course we can cross him on it.

09:55 2 But the problem is, then, that puts us in the position

09:55 3 of saying, please amplify and expand on your report to

09:56 4 fill in the gaps, which he'll obviously be well

09:56 5 prepared to do.

09:56 6 And that's not -- and again, Your Honor's

09:56 7 guidance on experts and their reports is crystal clear.

09:56 8 We all know it. We have to hold our experts to their

09:56 9 reports, so do they. But if we're put in the position

09:56 10 of solving this by crossing him aggressively and

09:56 11 vigorously, all we do is let him build up his

09:56 12 infringement opinion beyond his report and beyond what

09:56 13 he has said he's able to do.

09:56 14 Now, let's look at Slide 10.

09:56 15 This is where the lawyers come in. And

09:56 16 the lawyers argue and they say, he's identified

09:56 17 [REDACTED] that can and do meet the limitations

09:56 18 of the asserted claims.

09:56 19 Now, there are [REDACTED]. We

09:56 20 don't think they meet the limitations of the asserted

09:56 21 claim, but proving noninfringement is not our burden.

09:56 22 Proving infringement -- and proving infringement isn't

09:56 23 just saying it, as Your Honor knows. It's saying,

09:56 24 here's [REDACTED]. Here's the claim language. Here's

09:56 25 how it meets it. Otherwise, he's just waving his

09:56 1 hands.

09:56 2 So this isn't actually an issue about,  
09:57 3 oh, there's too many paths to infringement. There are  
09:57 4 too many [REDACTED], and none of them are linked to the  
09:57 5 claim language.

09:57 6 So let's actually just establish this  
09:57 7 isn't lawyer argument. This isn't me saying this.  
09:57 8 This is Dr. Budavári saying this.

09:57 9 Let's look at Slide 11.

09:57 10 So again, credit my partner Ms. Stitt for  
09:57 11 asking a nice, precise question: [REDACTED]

09:57 12 [REDACTED]

09:57 13 [REDACTED]

09:57 14 That's the question.

09:57 15 And his answer, it's very long, as all  
09:57 16 his answers are. We've highlighted the relevant point:

09:57 17 [REDACTED] [REDACTED]

09:57 18 [REDACTED]

09:57 19 That determines it. He cannot tell you  
09:57 20 where the counting happens. He just says it happens.

09:57 21 The source code was produced. It's  
09:57 22 available. Technical documentation was produced.  
09:57 23 Witnesses were examined. And he cannot answer the  
09:58 24 question of where a count that meets the requirements  
09:58 25 of the claims happen. He can tell you where [REDACTED]

09:58 1 happen, but he can't do the job he's required to do for  
09:58 2 them to be able to put on their infringement case.

09:58 3 But it gets worse. Let's go to Slide 12.

09:58 4 It's a longer question, but it's still a  
09:58 5 good one: So your opinion, just so I understand, is  
09:58 6 that because [REDACTED]

09:58 7 [REDACTED], it's your opinion that Google Maps  
09:58 8 as a product must perform an incrementing of a count  
09:58 9 somewhere, but you are unable to tell me specifically  
09:58 10 where the incrementing of a count occurs; is that  
09:58 11 correct?

09:58 12 This is what the report says.

09:58 13 That is it in a nutshell. And we -- and  
09:58 14 probably there's a reason we got to this problem --  
09:58 15 this point. Not -- well, the real reason is because  
09:58 16 Google's products don't work in the way the claims  
09:58 17 require. So we can't point to something specific, but  
09:58 18 there's another problem.

09:59 19 Slide 13.

09:59 20 And that's because he assigned no  
09:59 21 specific meaning to the claim language.

09:59 22 Now, we're not complaining that he didn't  
09:59 23 do a construction or there should have been a  
09:59 24 construction. He's just saying, there's no specific  
09:59 25 meaning assigned to this count in regard to Claim

09:59 1 Element 1[c].

09:59 2 Now, the claim element has its language.  
09:59 3 It refers to counting of stationary states associated  
09:59 4 with specific distinct signal sources. That's the  
09:59 5 words. That's what the claim says.

09:59 6 But he's saying, I don't have to do more.  
09:59 7 I can't do more because, that element, I don't have any  
09:59 8 particular meaning for that.

09:59 9 He could read it. All he has to do for  
09:59 10 them to meet their burden is say, that's the distinct  
09:59 11 signal sources. Here's how that count -- here's how  
09:59 12 it's associated with the stationary state. Here's how  
09:59 13 that count is incremented. We could cross him on that,  
09:59 14 but he doesn't do that.

09:59 15 And every question we asked him to poke  
09:59 16 out the holes fixes the problem for them that they  
09:59 17 can't fix because he's limited by his report and he's  
10:00 18 limited by his own confessed ignorance. It's not just  
10:00 19 the report. He says, I can't do it. I don't know  
10:00 20 where it is.

10:00 21 Now, that's 1[c].

10:00 22 Similar problem with Element 1[d], so  
10:00 23 independent argument, independent basis.

10:00 24 Let's go to the next slide, Slide 14.

10:00 25 And here's the key point. It's counting

10:00 1 a different thing. Element 1[c] counts one thing;  
10:00 2 Element 1[d] counts another thing.

10:00 3 Now, it's interesting that on -- in their  
10:00 4 slides that we saw, they include excerpts from the  
10:00 5 documents to which he strings cites, but they don't  
10:00 6 actually show his explanation of them.

10:00 7 But here's the point, even if you credit  
10:00 8 his explanation, he's [REDACTED] the wrong thing. And we  
10:00 9 know this because of his own analysis.

10:00 10 Let's go to Slide 15.

10:00 11 So here's what we've depicted where  
10:00 12 Dr. Budavári at Paragraph 111 is of his report, which  
10:00 13 is in the record.

10:00 14 This is his analysis of the particular  
10:00 15 count in Claim Element 1[d]. And we put the language  
10:00 16 there so the Court can see it's different. 1[d]  
10:01 17 requires: A frequently incremented count for one or  
10:01 18 more similar sets of one or more distinct signal  
10:01 19 sources.

10:01 20 1[c]: A count for a stationary state  
10:01 21 associated with the set of one or more distinct signal  
10:01 22 sources at the current time.

10:01 23 They're different counters. But what  
10:01 24 does he do in his report? He says, I know it's in 1[d]  
10:01 25 because I found it in 1[c].

10:01 1                   But they're different. But that -- and  
10:01 2 that is what his report says. I don't need to reread  
10:01 3 it. It is in the record.

10:01 4                   So independently, he fails to meet his  
10:01 5 burden on Element 1[d]. It's independent basis of  
10:01 6 summary judgment that takes out all claims.

10:01 7                   Now let's turn for a moment to the  
10:01 8 apparatus claims. That's Claim 11 with its dependent  
10:01 9 Claim 14.

10:01 10                  Next slide, please.

10:01 11                  So again, as I mentioned in the  
10:01 12 introductory remarks, it's an apparatus. It's an  
10:01 13 apparatus that has to have -- here's the difference  
10:01 14 really. It has to have at least one memory including  
10:02 15 computer instructions, the at least one memory and  
10:02 16 computer instructions configured to, with the at least  
10:02 17 one processor, cause the apparatus at least to...

10:02 18                  So it has to do all those things.

10:02 19                  Now, it doesn't do all those things for  
10:02 20 the reasons we already described, but independently  
10:02 21 they can't prove that it has the required apparatus.

10:02 22                  Let's turn to the next slide.

10:02 23                  So this is from Paragraph -- Slide 17 is  
10:02 24 from Paragraph 158 of Dr. Budavári's report. And this  
10:02 25 is where he says, well, it's got the stuff that it

10:02 1 needs. It has the physical things because it's an  
10:02 2 apparatus claim.

10:02 3 And he relies on a figure. And he  
10:02 4 actually has a piece of paper here, and he says: The  
10:02 5 following figures demonstrate that the [REDACTED]

10:02 6 [REDACTED]  
10:02 7 [REDACTED] as claimed,  
10:02 8 thereby satisfying Claim Elements 11[a] and 11[b].

10:02 9 Now, he's right. There is at least a  
10:02 10 processor and there's at least one memory, but that's  
10:02 11 not the requirement of the claim. It's a claim -- it's  
10:02 12 a memory and a processor that are configured with  
10:03 13 instructions to do what is required.

10:03 14 And he doesn't point out -- there's two  
10:03 15 problems. One is, he never says where's the  
10:03 16 instructions. Here's the memory with the instructions.

10:03 17 And the other is, if you look at any one  
10:03 18 of these accused [REDACTED], they have two different types  
10:03 19 of memory. And he never says which memory it is or  
10:03 20 that there is -- the instructions that are required.  
10:03 21 They're configured with the instructions that are  
10:03 22 required. He just says, hey. There's memories.  
10:03 23 There's a processor.

10:03 24 We agree there's memories. We agree  
10:03 25 there's a processor. That's not what the claim

10:03 1 requires. It requires more.

10:03 2 Let's look at the next slide.

10:03 3 So now at deposition he says, well, it's  
10:03 4 got to be RAM, because a person of ordinary skill would  
10:03 5 understand RAM is the memory. Now, there, either he's  
10:03 6 doing claim construction or he's missing the exercise.  
10:03 7 We're not doing claim construction here. He's required  
10:03 8 to say, this is the memory that is configured with the  
10:03 9 instructions. He says it's the RAM, but he admits it's  
10:03 10 not in his report.

10:03 11 And he still doesn't say that the  
10:04 12 instructions are in there, that it's configured with  
10:04 13 those instructions. And there's a reason why he cannot  
10:04 14 say that. The lawyers told us that.

10:04 15 And that's on the next slide, Slide 19.

10:04 16 This is from their opposition brief,  
10:04 17 Docket 191 at Page 12, where they're justifying what he  
10:04 18 said. Well, even if you credit RAM, he picked the RAM.  
10:04 19 It can and does hold computer instructions and  
10:04 20 variables when a computer or mobile device is  
10:04 21 operating.

10:04 22 Now, they don't show that it ever holds  
10:04 23 the required instructions. And it's when a computer  
10:04 24 device or a mobile device is operating, which means you  
10:04 25 have to turn it on, because as we know, RAM is volatile

10:04 1 memory. There's nothing in it unless it's on. And  
10:04 2 then something has to be loaded into it.

10:04 3 So an app has to selected, the app has to  
10:04 4 be turned on, it has to be loaded, it has to be  
10:04 5 operated. And Google doesn't do that; the user does  
10:04 6 that. But this is a direct infringement case. Google  
10:04 7 cannot directly infringe. So for that related  
10:05 8 independent reason, we're entitled to summary judgment  
10:05 9 of noninfringement on these apparatus claims.

10:05 10 So I'll stop there and address any  
10:05 11 questions afterwards. Thank you, Your Honor.

10:05 12 THE COURT: Thank you.

10:05 13 A response?

10:05 14 MR. LEE: All right. Hello, Your Honor.  
10:05 15 Alden Lee for plaintiff Brazos.

10:05 16 First of all, is there anything that you  
10:05 17 wanted me to address right off the bat? Anything you  
10:05 18 had -- just launch right into it then.

10:06 19 I did want to bring something up. I see  
10:06 20 folks in the gallery there. The information that I'm  
10:06 21 going to show may implicate source code. Are we all  
10:06 22 good?

10:06 23 MR. LANIER: No. Actually, we'd just  
10:06 24 send people out under protective order. Step out if  
10:06 25 you're going to show source code, and we appreciate you

10:06 1 raising it.

10:06 2 MR. LEE: Yeah. We will be showing you  
10:06 3 certain source code or things that implicate source  
10:06 4 code, so want to raise that right off the bat and go  
10:06 5 ahead and...

10:06 6 MR. LANIER: So can we...

10:06 7 MR. LEE: Yeah.

10:06 8 MR. LANIER: I don't know if the guy -- I  
10:06 9 don't know who the other folks in the room are. That's  
10:06 10 one of our team over there. I don't know who these  
10:06 11 three folks are.

10:06 12 MR. SIEGMUND: They're at my firm.

10:06 13 They're under the PO.

10:06 14 MR. LANIER: All right. Thank you.

10:06 15 (Sealed proceedings.)

10:06 16 [REDACTED]

10:06 17 [REDACTED]

10:06 18 [REDACTED]

10:06 19 [REDACTED]

10:06 20 [REDACTED]

10:06 21 [REDACTED]

10:06 22 [REDACTED]

10:07 23 [REDACTED]

10:07 24 [REDACTED]

10:07 25 [REDACTED]







10:11 1 [REDACTED]

10:12 2 [REDACTED] [REDACTED] [REDACTED]

10:12 3 [REDACTED] [REDACTED] [REDACTED]

10:12 4 [REDACTED]

10:12 5 [REDACTED]

10:12 6 [REDACTED]

09:42 7 (Sealed proceedings end.)

10:12 8 THE COURT: Okay.

10:12 9 MR. LANIER: Thank you.

10:12 10 And we appreciate the warning on that as

10:12 11 well. Thank you.

10:12 12 So, Your Honor, I'll respond to the

10:12 13 points that were made in the order that they were made,

10:12 14 just very briefly. The first point that was made was

10:12 15 that various apps are preinstalled. The user has to

10:12 16 decide to have them. I have apps preinstalled on my

10:12 17 phone that I do not use, I have not turned on. I don't

10:12 18 use those services.

10:12 19 The user has to make that election. Even

10:12 20 if an app is preinstalled and available, the user has

10:12 21 to make that choice. And so that choice is not

10:12 22 Google's choice. The option's available, but the user

10:13 23 has to turn it on. And there's no evidence of Google's

10:13 24 control of the user, as we say, you could do this thing

10:13 25 if you wished, but that's not direct infringement to

10:13 1 say, you could do this if you wanted; you're doing it,  
10:13 2 not Google.

10:13 3 So Claims 11 and 14 should drop on that  
10:13 4 basis alone; and additionally, for the other reasons we  
10:13 5 identified, and I won't repeat them, about failing to  
10:13 6 identify the code, et cetera.

10:13 7 Now, let's turn to Elements 1[c] and  
10:13 8 1[d].

10:13 9 So what we saw, Your Honor, was a parade  
10:13 10 of source code references. We saw a bunch of titles to  
10:13 11 source code. We did not see, because we didn't see it  
10:13 12 in the report, a mapping of that to the claim element  
10:13 13 and an explanation of how that evidence satisfies the  
10:13 14 requirements of the claim element.

10:13 15 A parade of source code is a list of  
10:13 16 things that are going on in there, that in the words --  
10:13 17 I think it's at Paragraph 99 -- implies, suggests, or  
10:13 18 otherwise evidences that the thing is happening; but  
10:13 19 the job of the expert, the job of the plaintiff is not  
10:14 20 to imply or suggest.

10:14 21 They need to evidence, they need to show;  
10:14 22 and they do not do that. And the reason they do not do  
10:14 23 that is illustrated on Slide 11, which is, again, from  
10:14 24 Dr. Budavári.

10:14 25 [REDACTED]

10:14 1 [REDACTED] [REDACTED]  
10:14 2 [REDACTED]  
10:14 3 He cannot show, even with that parade of  
10:14 4 source code, where the infringement or where the  
10:14 5 practicing of that element occurs. And that's their  
10:14 6 burden, that's their requirement.

10:14 7 Now, the other thing that's worth  
10:14 8 pointing out is if you look at Paragraph 83 of  
10:14 9 Dr. Budavári's report, the parade of source code was  
10:14 10 designed to say, hey, look, we showed you that they  
10:14 11 counted; but what Dr. Budavári says is, [REDACTED]

10:14 12 [REDACTED]  
10:14 13 [REDACTED]  
10:14 14 [REDACTED].

10:14 15 But let's jump to Slide 3, I believe.

10:15 16 Slide 4.

10:15 17 But it's not just a count of a stationary  
10:15 18 state that's required by the Claim Element 1[c]. It's  
10:15 19 a count of a stationary state associated with the set  
10:15 20 of one or more distinct signal sources at the current  
10:15 21 time.

10:15 22 And Dr. Budavári does not establish that.  
10:15 23 I'll reread his report again. [REDACTED]

10:15 24 [REDACTED]  
10:15 25 [REDACTED]

10:15 1 [REDACTED]  
10:15 2 But this is a method claim with specific  
10:15 3 requirements. This requirement is not met, and he  
10:15 4 doesn't even say it does because as we know, he can't.  
10:15 5 He testified that he can't.

10:15 6 Now let's turn to Claim Element 1[d].

10:15 7 And bring up Slide 15, if we could.

10:15 8 Now, there was a variety of evidence that  
10:15 9 was shown, as we pointed out in our papers. What was  
10:15 10 in his report is what they're limited to. A lot of  
10:15 11 that was not in his report, but here's the more  
10:15 12 important point. That all goes to the point of  
10:15 13 establishing that there are -- got to dry my glasses --  
10:16 14 a primary stationary state or a primary set of  
10:16 15 stationary states.

10:16 16 But the count in Element 1[d] that is  
10:16 17 incremented is for similar sets of one or more distinct  
10:16 18 signal sources. So they're using -- relying on  
10:16 19 Element 1[c] to meet 1[d], but they're not proving up  
10:16 20 all of 1[d], which is the frequently incremented count  
10:16 21 for one or more similar sets of one or more distinct  
10:16 22 signal sources.

10:16 23 So they've taken their shot. He had his  
10:16 24 report. He was deposed. They've marshaled it  
10:16 25 together, and in neither -- with respect to any of the

10:16 1 three elements we challenged that independently take  
10:16 2 out some or all of the claims in the case, they have  
10:16 3 not shown you a specific linkage of the evidence to the  
10:16 4 claim language, parts of the claim language, different  
10:16 5 claim language; not all of it, and that's what's  
10:16 6 required.

10:16 7 I'll stop there unless Your Honor has any  
10:16 8 questions.

10:16 9 THE COURT: I don't.

10:16 10 MR. LANIER: Thank you, Your Honor.

10:16 11 MR. LEE: If I may, Your Honor.

10:17 12 Alden Lee for Brazos again. I just  
10:17 13 wanted to raise two points.

10:17 14 Everything I showed you, Your Honor, was  
10:17 15 from Dr. Budavári's report and would be enough to carry  
10:17 16 our burden regarding all the disputed claim elements.

10:17 17 For instance, if we -- if I could just  
10:17 18 show a portion of Dr. Budavári's report, you'll see  
10:17 19 kind of what I mean and where he does tie his opinions  
10:17 20 to the evidence.

10:17 21 I apologize for the technical  
10:18 22 difficulties, Your Honor.

10:18 23 Okay. There we go.

10:18 24 So what I'm showing you is Paragraph 99  
10:18 25 of Dr. Budavári's report where he clearly goes through

10:18 1 pieces of the source code. And actually, he goes and  
10:18 2 ties it to his opinion.

10:18 3 So I'm not exactly sure what counsel's  
10:18 4 talking about when he alleges that we're not doing what  
10:18 5 we're supposed to be doing to show infringement.

10:18 6 And just like to reemphasize that at  
10:18 7 trial, we will not ask Dr. Budavári to stray from his  
10:18 8 expert report.

10:18 9 And with that, do you have any other --  
10:19 10 any questions for me, Your Honor?

10:19 11 THE COURT: I don't.

10:19 12 MR. LEE: Thank you.

10:19 13 (Off-the-record bench conference.)

10:19 14 THE COURT: The Court is going to deny  
10:19 15 the motion.

10:19 16 Next up -- give me one second -- I have  
10:19 17 the Daubert motion to exclude certain damage opinions  
10:19 18 of Mr. Bakewell in terms of reliance on incomparable  
10:19 19 agreements. I'll hear that next.

10:19 20 MR. SIEGMUND: And, Your Honor, it's the  
10:19 21 exact same issue that you just granted. So I don't  
10:19 22 think we need to take up argument unless Google thinks  
10:19 23 we do. But it's the exact same argument on  
10:19 24 technological comparability.

10:20 25 MR. JONES: Yes, Your Honor. If I

10:20 1 understand the Court's ruling with regard to the three  
10:20 2 [REDACTED] agreements, the [REDACTED] agreement, the [REDACTED]  
10:20 3 agreement, and the [REDACTED] agreement, the Court has  
10:20 4 ruled and excluded any portions of Mr. Bakewell's  
10:20 5 report that relies upon those agreements.

10:20 6 THE COURT: Correct.

10:20 7 MR. JONES: But the rest of his report  
10:20 8 remains intact.

10:20 9 THE COURT: Yes.

10:20 10 MR. JONES: With that understanding --  
10:20 11 thank you, Your Honor.

10:20 12 THE COURT: Next I have Google's motion  
10:20 13 to exclude the testimony of Mr. Blok, B-l-o-k.

10:20 14 MR. JONES: Your Honor, if I could, on  
10:20 15 behalf of time, I'll probably address both the motions  
10:20 16 concerning Mr. Blok with regard to the 580 case and the  
10:20 17 585 case together since, as we just saw with regard to  
10:20 18 Mr. Bakewell, there's some similarities there.

10:20 19 With regard to the 580 case and  
10:20 20 Mr. Blok's opinion, I would -- I would rest on the  
10:21 21 papers with regard to that particular motion, with one  
10:21 22 exception. There's one thing that gets very confusing  
10:21 23 in the briefing, and I would like to point out what  
10:21 24 this particular problem is with Mr. Blok's opinion.

10:21 25 With regard to [REDACTED], which is the

10:21 1 accused product in the 580 case, there is [REDACTED]  
10:21 2 [REDACTED].  
10:21 3 Originally in this case, [REDACTED]  
10:21 4 [REDACTED] were accused of infringement. There is no  
10:21 5 doubt now, based upon the motion for summary judgment  
10:21 6 that was filed by the defendants, as well as by  
10:21 7 statements by the plaintiffs, that [REDACTED] is not in  
10:21 8 question in this suit, is not accused of infringement.  
10:21 9 Now, the way this particular product  
10:21 10 works is [REDACTED]  
10:22 11 [REDACTED] [REDACTED]  
10:22 12 [REDACTED] [REDACTED]  
10:22 13 [REDACTED] .  
10:22 14 [REDACTED]  
10:22 15 [REDACTED] [REDACTED]  
10:22 16 [REDACTED]  
10:22 17 [REDACTED]  
10:22 18 [REDACTED]  
10:22 19 [REDACTED] [REDACTED]  
10:22 20 [REDACTED]  
10:22 21 [REDACTED]  
10:22 22 Now, what Mr. Blok has done is he says,  
10:22 23 well, look. [REDACTED] came out in April of 2019. And  
10:23 24 then he assumes that after that, any time a scan is  
10:23 25 done, [REDACTED]

10:23 1 [REDACTED] .

10:23 2 But the facts in this case clearly show

10:23 3 us that that is not correct. What we see when we

10:23 4 review the factual record is that that is, in fact,

10:23 5 [REDACTED]

10:23 6 [REDACTED] .

10:23 7 In fact, the evidence -- and it's quite

10:23 8 confusing on this, but there's evidence in this case

10:23 9 that was cited to you in the briefing that shows [REDACTED]

10:23 10 [REDACTED]

10:23 11 [REDACTED] . So we know

10:23 12 that there are noninfringing scans by [REDACTED]

10:24 13 [REDACTED] included in Mr. Blok's totals.

10:24 14 Furthermore, there's evidence from the

10:24 15 deposition testimony in the case -- and again, it's

10:24 16 quite confusing -- as to when, in fact, they stopped

10:24 17 using altogether [REDACTED], that

10:24 18 everybody says noninfringes.

10:24 19 The exact extent of how many [REDACTED]

10:24 20 [REDACTED] are being counted by Mr. Blok is hard to

10:24 21 tell. But, Your Honor, that is certainly not the fault

10:24 22 of the defendants.

10:24 23 The plaintiff accused [REDACTED]

10:24 24 until March the 22nd, 2023, when fact discovery closed.

10:24 25 They served an infringement report on April the 4th,

10:24 1 2023. And it was then, after discovery had closed, for  
10:24 2 the first time they dropped [REDACTED] And  
10:25 3 that's why, when they dropped it in their infringement  
10:25 4 report, that we moved for summary judgment.

10:25 5 So where we stand here today is what we  
10:25 6 know is Mr. Blok's report bases his damage figure in  
10:25 7 the 580 case upon scans, and it's on scans that have to  
10:25 8 be done by [REDACTED] combined with [REDACTED] or  
10:25 9 [REDACTED] combined with [REDACTED] And we know  
10:25 10 from the evidence in this case that there are pure  
10:25 11 [REDACTED] scans involved in the basis that he used.

10:25 12 Now, that's my argument with regard to  
10:25 13 the 580 case and the motion to strike there.

10:25 14 And now I'd like to move to the 585 case  
10:25 15 with Your Honor's permission. And also, I'm about to  
10:25 16 get into some confidential matters with regard to the  
10:25 17 585 and request that the courtroom be sealed.

10:26 18 (Sealed proceedings.)

10:26 19 [REDACTED] [REDACTED]  
10:26 20 [REDACTED]  
10:26 21 [REDACTED]  
10:26 22 [REDACTED]  
10:26 23 [REDACTED]  
10:26 24 [REDACTED] [REDACTED]  
10:26 25 [REDACTED]













10:34 1 [REDACTED]  
10:34 2 [REDACTED]  
10:34 3 [REDACTED] [REDACTED]  
10:34 4 [REDACTED]  
10:34 5 [REDACTED] [REDACTED]  
10:34 6 [REDACTED]  
10:34 7 [REDACTED]  
10:34 8 [REDACTED]  
10:34 9 [REDACTED]  
10:34 10 [REDACTED]  
10:35 11 [REDACTED]  
10:35 12 [REDACTED]  
10:35 13 [REDACTED]  
10:35 14 [REDACTED]  
10:35 15 [REDACTED]  
09:42 16 (Sealed proceedings end.)  
10:35 17 THE COURT: If you'll give me one second.  
10:35 18 (Off-the-record bench conference.)  
10:35 19 THE COURT: Okay. A response?  
10:35 20 MR. SIEGMUND: Yes, Your Honor. Went a  
10:36 21 little out of order here. So we're going to address  
10:36 22 the 580 motion first, which Ms. Ruiz -- this will be  
10:36 23 her first argument in federal court -- is going to  
10:36 24 address, and then Mr. Love will address the 585 case.  
10:36 25 THE COURT: Welcome. I hope you feel

10:36 1 comfortable in the courtroom.

10:36 2 MS. RUIZ: Oh, I do. It's very nice  
10:36 3 here. Good morning, Judge Albright.

10:36 4 THE COURT: Good morning.

10:36 5 MS. RUIZ: I'm happy to be here.

10:36 6 THE COURT: With regard to the 580 --

10:36 7 MS. RUIZ: Yes, Your Honor.

10:36 8 THE COURT: -- what I care a lot about is  
10:36 9 how your expert came up with the [REDACTED]

10:36 10 [REDACTED]. That is the issue that is  
10:36 11 concerning to me.

10:36 12 MS. RUIZ: In the 580?

10:36 13 THE COURT: It might be [REDACTED].  
10:36 14 Basically the number that was --

10:36 15 MR. LOVE: Excuse me, Your Honor. That's  
10:36 16 in the 585 case. Mr. Jones took us a little bit out of  
10:36 17 order, no fault to him. But that's the 585 case, and I  
10:36 18 can address that now if you would like.

10:37 19 THE COURT: Let's go ahead and do that  
10:37 20 because -- let's go ahead and take that up, and then  
10:37 21 I'll take the -- I'm sorry but I'm backwards. I did --  
10:37 22 but that -- when I -- with what Mr. Jones has argued  
10:37 23 about that number is what I care about from that  
10:37 24 patent. And then I'll take up the other patent on the  
10:37 25 580.

10:37 1 MR. LOVE: Okay. So, Your Honor, I think  
10:37 2 it's important for the Court to understand when we talk  
10:37 3 about use cases and what we have accused of  
10:37 4 infringement, from a consumer-facing perspective, the  
10:37 5 use cases involved in this case, they consist of what I  
10:38 6 have up on the screen here. And if you look at the way  
10:38 7 that Google describes them, you have promoted pins,  
10:38 8 text search, auto suggest, local universal immersive.

10:38 9 And the struggle that Mr. Blok had to  
10:38 10 grapple with, not only, you know, from the traditional  
10:38 11 standpoint that Google is the one that defines the  
10:38 12 arena within which he provides his opinions from a  
10:38 13 damages evidence standpoint, but Google monetizes their  
10:38 14 products and services from a very complicated, complex  
10:38 15 perspective.

10:38 16 And so I want to take the Court through  
10:38 17 just this sort of narrow perspective from a  
10:38 18 consumer-facing side and let the Court see what we're  
10:38 19 talking about when we talk about just infringement of  
10:38 20 Google Maps Mobile.

10:38 21 So the first example, if you just open --  
10:38 22 and this is illustrative, this is demonstrative. This  
10:38 23 is from my phone. Excuse the Pizza Hut icon. I eat  
10:39 24 there frequently.

10:39 25 This is GMM when you open it. This is

10:39 1 Google Maps Mobile when you open the application on  
10:39 2 your phone. The next one, you'll see this is the  
10:39 3 screen recording of promoted pins. And this is in  
10:39 4 little Henderson, Texas, not Austin. But you can see  
10:39 5 promoted pin doesn't require a text search.

10:39 6 The next one is a text search where a  
10:39 7 user can type in, for example, Schlotzsky's, or coffee,  
10:39 8 and it uses the device location to generate results  
10:39 9 that are relevant to the area and then feed the user an  
10:39 10 advertisement, and then the user has different options  
10:39 11 to take directions there or whatnot.

10:39 12 But this type of use case is dependent  
10:39 13 upon what's called [REDACTED]. The location  
10:39 14 of the device.

10:39 15 If you go to the next screen recording,  
10:39 16 we see what Google calls auto suggest. And again,  
10:39 17 typing in Schlotzsky's, the results depend upon  
10:40 18 [REDACTED] And you can see the different  
10:40 19 results for Schlotzsky's, from Henderson to Kilgore to  
10:40 20 Tyler, all East Texas.

10:40 21 And then the last example is [REDACTED]  
10:40 22 [REDACTED] And what that is, is when you  
10:40 23 open up -- if you have an iOS device, you open up  
10:40 24 Safari on your browser, you type in oil change near me,  
10:40 25 this will take you through the steps to arrive at

10:40 1 Google Maps Mobile and serve you advertisements.

10:40 2 So these are the use cases that we are --

10:40 3 we say are at issue here.

10:40 4 Next slide, please.

10:40 5 Now, what Google would like this case to

10:40 6 be about is what I have up on the screen now, and that

10:40 7 is [REDACTED],

10:40 8 when you type in a search for a business, again,

10:40 9 dependent on [REDACTED]. And [REDACTED]

10:40 10 is part of the [REDACTED] shows up and you can see

10:41 11 the [REDACTED] of a business; but again, this is

10:41 12 dependent upon [REDACTED].

10:41 13 And the next example of what Google would

10:41 14 like this case to be about, of the narrow view, is

10:41 15 [REDACTED], which is the next slide.

10:41 16 And [REDACTED] just generally, is the

10:41 17 ability for a user to check out their history, if they

10:41 18 have this functionality turned on, to check out

10:41 19 [REDACTED] of their -- of their locations over a certain

10:41 20 time period.

10:41 21 These are all consumer-facing use cases,

10:41 22 and this -- these two functionalities, [REDACTED]

10:41 23 [REDACTED] -- if you want to look at the universe of

10:41 24 use cases, we're looking at a piece of pie about this

10:41 25 big, but [REDACTED] is a very, very

10:41 1 small part of the infringement case, and the use cases  
10:41 2 at issue.

10:41 3 So I just wanted to make sure the Court  
10:42 4 understood that.

10:42 5 Now, with respect to the technical  
10:42 6 comparability analysis. If you look at --

10:42 7 If we go to Slide 22, Ms. Ruiz.

10:42 8 These are a description of the -- of the  
10:42 9 technical apportionment steps that Mr. Blok performed  
10:42 10 in Georgia-Pacific Factor 13. The first thing that he  
10:42 11 did was he looked at the 2021 product revenue report  
10:42 12 and, you know, he applied this factor --

10:42 13 If we go back to Slide 14, Ms. Ruiz. 14.

10:42 14 Mr. Jones made the comment that Mr. Blok  
10:42 15 applied this factor, this [REDACTED] to global  
10:43 16 revenue. And so I have for the Court just an  
10:43 17 illustration of what this revenue picture looks like.

10:43 18 If you look at the blue bar, the global  
10:43 19 revenue [REDACTED]. The  
10:43 20 yellow bar is U.S. revenue [REDACTED]  
10:43 21 [REDACTED] but Mr. Blok did not  
10:43 22 utilize.

10:43 23 THE COURT: I was -- on the first one  
10:43 24 when you -- on all these when you say "global revenue,"  
10:43 25 are we talking about -- how was it distinguished just

10:43 1 for the Mobile? That's what I care about.

10:43 2 MR. LOVE: Right. And that's what I  
10:43 3 wanted to make sure if the Court understood, was that  
10:43 4 Mr. Jones said that Mr. Blok applied this [REDACTED] to  
10:43 5 global revenue of -- and that global revenue [REDACTED]  
10:43 6 [REDACTED]. Mr. Blok did not apply that  
10:43 7 [REDACTED] to that number. He conducted steps of  
10:43 8 apportionment before he ever got to [REDACTED], which is for  
10:43 9 U.S. revenue only. Not global revenue. So I just want  
10:44 10 to make sure that the Court was clear on that.

10:44 11 THE COURT: Well, in addition, I want to  
10:44 12 make sure that it has to do with revenue that's  
10:44 13 tethered only to the accused -- to the accused  
10:44 14 functionality.

10:44 15 MR. LOVE: Of course. Of course, Your  
10:44 16 Honor. And if you look at Slide No. 12 --

10:44 17 Ms. Ruiz, No. 12.

10:44 18 We can see that Mr. Blok utilized what's  
10:44 19 called a [REDACTED] -- to determine  
20 that the appropriate revenue bucket to apply this  
10:44 21 factor to was the [REDACTED]. And if you  
10:44 22 look at the [REDACTED] and you look at  
10:44 23 Mr. Blok's report, he describes what is in this [REDACTED]  
24 [REDACTED] based on the testimony of Google  
25 30(b)(6) witnesses.

10:44 1 And if you look at, you know, the revenue  
10:45 2 that's reported there overall, on the screen, you  
10:45 3 can -- you can see the size of the pie of all revenue  
10:45 4 that's subject to that report. What Mr. Blok did was  
10:45 5 he chose the [REDACTED], which is the green portion,  
10:45 6 which is [REDACTED] of the overall revenue  
10:45 7 reported in the [REDACTED].

10:45 8 And GMM stands for Google Maps Mobile.

10:45 9 So the universe of revenue that Mr. Blok  
10:45 10 applied his [REDACTED] the use cases that correspond  
10:45 11 with that revenue, like we talked about earlier, if you  
10:45 12 look at Slide 13 -- Ms. Ruiz -- we can see that what  
10:45 13 Mr. Vlahov for Google, a 30(b)(6) deposition witness,  
10:45 14 described as a typical use case, local universal  
10:45 15 immersive, and Maps.

10:45 16 These are the three categories of use  
10:45 17 cases that Mr. Blok depended upon when he selected the  
10:46 18 [REDACTED] from the Maps portion of the xBridge  
10:46 19 revenue report. So he -- you know, before he ever gets  
10:46 20 to applying the [REDACTED], he conducted these levels  
10:46 21 of apportionment to get down to the [REDACTED]  
10:46 22 figure.

10:46 23 Now, to the Court's question, more  
10:46 24 specifically, with respect to the technical  
10:46 25 apportionment factor -- unless the Court wants to hear

10:46 1 any more about the revenue bucket --

10:46 2 Okay. In terms of this factor being  
10:46 3 applied.

10:46 4 If we go to Slide 22, Ms. Ruiz.

10:46 5 These -- this is the general description  
10:46 6 of the steps that were reported that Mr. Blok took.

10:46 7 And you can see that he took the 2021 product revenue  
10:46 8 report which identified net revenue for comparable

10:46 9 [REDACTED] which the Court has already addressed in the  
10:47 10 previous argument, and you've said Dr. Budavári's  
10:47 11 opinion on that is not coming in the case.

10:47 12 Now, that would have resulted in a

10:47 13 [REDACTED] technical apportionment factor. But what  
10:47 14 the Court hasn't discussed with us is the [REDACTED]  
10:47 15 factor that was applied based on the [REDACTED]

10:47 16 [REDACTED] naming for the functionality at issue. And  
10:47 17 that's what I want to talk with about the Court  
10:47 18 primarily.

10:47 19 Ms. Ruiz, go to Slide No. 26.

10:47 20 And Dr. Budavári's report, which I have  
10:47 21 up on the screen here on Slide 26, it appears in  
10:47 22 Paragraph 213 of Dr. Budavári's report, but it also  
10:47 23 appears in Paragraphs 214 and 215 of Mr. Blok's report.  
10:47 24 And this is what Dr. Budavári discusses with respect to  
10:47 25 [REDACTED]

10:47 1 The way that I understand [REDACTED] is not  
10:48 2 a discrete feature of Google Maps Mobile. [REDACTED]

10:48 3 [REDACTED]  
10:48 4 [REDACTED] It's not a feature set. It's not a  
10:48 5 clearly defined feature like [REDACTED].  
10:48 6 It is a monicker for functionality.

10:48 7 So when you look at Dr. Budavári's  
10:48 8 opinion, he's referring to [REDACTED] in his report, and then  
10:48 9 he refers to the specific Google documents that clearly  
10:48 10 describe and connect this description of functionality,  
10:48 11 this monicker, with the functionality at issue in this  
10:48 12 case.

10:48 13 And so based on that technical connection  
10:48 14 between Dr. Budavári's opinion and this type of  
10:48 15 functionality or the monicker used by Google, Mr. Blok  
10:48 16 did an analysis that depended upon a document that's  
10:49 17 very important to Google. And it's called the [REDACTED]

10:49 18 [REDACTED]  
10:49 19 It's on Page 25, Ms. Ruiz.

10:49 20 Slide 25. I'm sorry.

10:49 21 So in this technical document where  
10:49 22 Google describes signals used to infer current [REDACTED]  
10:49 23 [REDACTED], the document places [REDACTED]  
10:49 24 [REDACTED] that corresponds with [REDACTED]  
10:49 25 [REDACTED] for device with respect to [REDACTED]. That

10:49 1 [REDACTED] is where Mr. Blok found this number in  
10:49 2 Google's documents.

10:49 3 Now, of course, they want to -- they want  
10:49 4 to run away from their own documents, but this is  
10:49 5 where -- this is the basis for Mr. Blok's [REDACTED]  
10:49 6 that he used as a technical apportionment factor.

10:49 7 And if you look on Page --

10:50 8 Slide 27, Ms. Ruiz.

10:50 9 The technical apportionment calculation,  
10:50 10 which appears in Paragraph 215 of Mr. Blok's report,  
10:50 11 you can see that the [REDACTED] is applied for the time  
10:50 12 period which Mr. Block calculates on a [REDACTED]  
10:50 13 [REDACTED].

10:50 14 So if there's any more questions about  
10:50 15 this particular issue, Your Honor, I can answer those  
10:50 16 questions.

10:50 17 THE COURT: No. I'm good.

10:50 18 MR. LOVE: Okay.

10:50 19 THE COURT: And now the other motion -- I  
10:50 20 mean, the other patent?

10:50 21 MS. RUIZ: Hello, Your Honor.

10:50 22 THE COURT: Yes, ma'am.

10:50 23 MS. RUIZ: Just let me know when --

10:50 24 THE COURT: I'm ready.

10:50 25 MS. RUIZ: -- you're ready. Then I'm

10:50 1 ready too.

10:50 2 This is the 580 motion, so the  
10:50 3 barcode-scanning technology.

10:51 4 And so Google's motion should be denied  
10:51 5 for several reasons. The first one is that we  
10:51 6 established earlier, and it is known to the Court, that  
10:51 7 there are several versions of [REDACTED] that build upon  
10:51 8 another, and what Brazos accuses is [REDACTED]

10:51 9 [REDACTED]

10:51 10 Mr. Blok was aware of this information,  
10:51 11 and he apportioned the value of the accused  
10:51 12 instrumentality that is limited to the contributions of  
10:51 13 the patent-in-suit to his [REDACTED]

10:51 14 And I have -- it's kind of a crude visual  
10:51 15 here where there is [REDACTED]  
10:51 16 [REDACTED] And with software code, these versions  
10:51 17 were wrapped around each other. And each version --  
10:51 18 like [REDACTED] contains portions or lines of source  
10:51 19 code from [REDACTED] Same with [REDACTED] And they  
10:51 20 cannot be separated.

10:52 21 One of the documentation submitted by  
10:52 22 Google indicates that [REDACTED].  
10:52 23 And similarly, [REDACTED], meaning --  
10:52 24 or sorry -- the [REDACTED]  
10:52 25 [REDACTED]

10:52 1 In Mr. Blok's report, he acknowledges  
10:52 2 that there are core functionalities associated with  
10:52 3 enabling the barcode and QR code scanning on a mobile  
10:52 4 device that are part of the accused technology.

10:52 5 And so he -- he used that in his  
10:52 6 reasonable royalty base, and he considered an  
10:52 7 incremental improvement of the accused technology over  
10:52 8 the prior iteration of [REDACTED] And I will go into  
10:52 9 that step-by-step how he did that.

10:52 10 So Mr. Blok uses scans as a [REDACTED]  
10:53 11 [REDACTED] for actual revenue attributable  
10:53 12 to the accused products. He -- where he apportions out  
10:53 13 the [REDACTED] from the accused technology is in  
10:53 14 this step the royalty rate per scan.

10:53 15 And within that calculation of the  
10:53 16 royalty rate per scan, there's an [REDACTED] a percent  
10:53 17 attributable to the patent-in-suit. Google argues that  
10:53 18 this percentage is arbitrary, that it has no basis.  
10:53 19 And on the contrary, Mr. Blok goes through this step by  
10:53 20 step in his report.

10:53 21 For example, in Paragraph 216 of his  
10:53 22 report, he showed that he used one of Google's  
10:53 23 documentation that showed an evaluation of the accused  
10:54 24 technology. And it looked to measuring improvements  
10:54 25 over -- of the accused technology over the prior

10:54 1 iteration, meaning improvements from [REDACTED]  
10:54 2 [REDACTED]  
10:54 3 It include percentages, as you can see in  
10:54 4 a screenshot, where [REDACTED]  
10:54 5 [REDACTED]  
10:54 6 [REDACTED]  
10:54 7 And Mr. Blok summarized this information  
10:54 8 in his report on Page 98, which you can see at the  
10:54 9 bottom of the screen.  
10:54 10 So Mr. Blok looked -- had spoken to  
10:55 11 Dr. Kozek, as well as referred to Dr. Kozek's report  
10:55 12 indicating that the invention claimed by the teachings  
10:55 13 of the patent-in-suit, absent this invention, that  
10:55 14 Google would not be able to realize the improvements  
10:55 15 and benefits.  
10:55 16 Below are some screenshots from a -- on  
10:55 17 the -- on the far left is from Mr. Blok's report. And  
10:55 18 it shows the percentages of what he was -- of what  
10:55 19 ended up being the [REDACTED]  
10:55 20 There was also a screenshot from Google's  
10:55 21 own evaluation report showing that incremental  
10:55 22 improvement.  
10:55 23 Eventually, Mr. Blok took the averages of  
10:55 24 those two improvements in order to apportion out the [REDACTED]  
10:55 25 [REDACTED] the accused technology. And

10:55 1 ultimately, he ended up at an [REDACTED]

10:56 2 [REDACTED]  
10:56 3 Does Your Honor have any questions  
10:56 4 before --

10:56 5 THE COURT: I was hoping you would get to  
10:56 6 the base number that he used. How did he get to the  
10:56 7 starting point of what the appropriate base was?

10:56 8 MS. RUIZ: The appropriate base for -- at  
10:56 9 the very beginning of his [REDACTED]

10:56 10 THE COURT: What the appropriate amount  
10:56 11 of the [REDACTED] that he was going to attribute  
10:56 12 to the technology that's in this patent.

10:56 13 MS. RUIZ: So we were at the [REDACTED]  
10:56 14 here in his calculation.

10:56 15 Does Your Honor have the question on this  
10:56 16 percent, this number?

10:56 17 THE COURT: Not the percent. How did  
10:56 18 he -- where does he get the base number that he starts  
10:57 19 with? Google has X revenue, but you're not entitled to  
10:57 20 apportion to all of that revenue.

10:57 21 What -- where did you get the starting  
10:57 22 base number?

10:57 23 MS. RUIZ: Yes, Your Honor. I'm going to  
10:57 24 go to Slide 19.

10:57 25 So [REDACTED]

10:57 1 [REDACTED]  
10:57 2 [REDACTED]. Thus, Mr. Blok used a number  
10:57 3 of scans in order to establish a reasonable royalty  
10:57 4 base.

10:57 5 THE COURT: A number of what?

10:57 6 MS. RUIZ: A number of scans, barcode  
10:57 7 scans.

10:57 8 THE COURT: Okay.

10:57 9 MS. RUIZ: He got this -- he explains it  
10:57 10 in his report that he got [REDACTED] from  
10:57 11 a Google document, which is -- you can see on the  
10:58 12 screen below.

10:58 13 And he looked at the metadata of this  
10:58 14 Google document, and it indicates that this usage data  
10:58 15 was likely from early 2022. And this becomes important  
10:58 16 later in his calculation.

10:58 17 He also utilized an [REDACTED]  
10:58 18 [REDACTED] from a Google document, which  
10:58 19 as you can see below, which indicates that QR code  
10:58 20 usage [REDACTED]  
10:58 21 [REDACTED].

10:58 22 So we have this [REDACTED]  
10:58 23 number, and we also have the [REDACTED] number.

10:58 24 THE COURT: And so how does he turn that  
10:58 25 into the base number?

10:58 1 MS. RUIZ: So he turns this into the base  
10:58 2 number by addressing [REDACTED] on the --  
10:58 3 in 2022, and then he calculates what those scans were  
10:59 4 in either direction, subtracting [REDACTED] from the  
10:59 5 previous years and then adding [REDACTED] in  
10:59 6 2023.

10:59 7 He multiplied that estimated percentage  
10:59 8 in the U.S., because these were worldwide scans, and he  
10:59 9 multiplied by [REDACTED] in order to get that base  
10:59 10 revenue valuing.

10:59 11 THE COURT: What does he use to get the  
10:59 12 base revenue value?

10:59 13 MS. RUIZ: So in order to get to that  
10:59 14 base revenue value, he looked to Google's distribution  
10:59 15 of revenue by geography from the accused dates 2019  
10:59 16 through 2022 and he looked at Google's 10-K and their  
10:59 17 revenues. And he used -- he determined that

11:00 18 [REDACTED] of revenues attributed by  
11:00 19 Google were from the U.S., and so he applied that --

11:00 20 THE COURT: And how did he get that  
11:00 21 number?

11:00 22 MS. RUIZ: He got that number -- as you  
11:00 23 can see below, on the very last screenshot of his  
11:00 24 report, and -- Mr. Blok looked to revenue that Google  
11:00 25 attributed -- that Google received in the United States

11:00 1 and in Europe, other Americas, all over the world, and  
11:00 2 he -- just to see what the percentage of revenue Google  
11:00 3 received from the U.S. versus worldwide.

11:00 4 And he attributed that [REDACTED] to  
11:00 5 the barcode scans worldwide in order to achieve barcode  
11:00 6 scans performed using the accused technology within the  
11:00 7 U.S. only.

11:01 8 Does that answer Your Honor's question?

11:01 9 THE COURT: Not quite. I'm -- yes. It  
11:01 10 answers my question of what he did, but not how he did  
11:01 11 it. So if that makes sense.

11:01 12 I mean, I'm expecting your expert to come  
11:01 13 in and explain what he did here. And I hear what  
11:01 14 you're saying he did, but not -- what numbers did he  
11:01 15 use -- where did he get the numbers he used to  
11:01 16 distinguish between, A, global and U.S.; and, two, what  
11:01 17 did he do -- what is in his report where he tethered  
11:01 18 what he was using to some -- something that a technical  
11:01 19 person or someone did that said, this is why you get to  
11:01 20 use this amount?

11:01 21 That's what -- how -- where did he get  
11:01 22 that -- where did he get the number from?

11:01 23 MS. RUIZ: I think what Your Honor's  
11:01 24 referring to is the reasonable royalty rate per scan,  
11:01 25 which is in the dollar amount. And that -- that's how

11:02 1 he converted scans to dollars.

11:02 2 THE COURT: Okay. Yes.

11:02 3 MS. RUIZ: Is that what you're referring  
11:02 4 to?

11:02 5 THE COURT: Yes.

11:02 6 MS. RUIZ: Apologies. I had a  
11:02 7 misunderstanding.

11:02 8 So to achieve the reasonable royalty rate  
11:02 9 per scan, Mr. Blok began with the market value of the  
11:02 10 accused technology.

11:02 11 Now, there are several third-party  
11:02 12 companies that use similar technologies to that of the  
11:02 13 accused technology [REDACTED].

11:02 14 Notably, Mr. Blok used a third-party  
11:02 15 company called Scandit. And the reason why he used  
11:02 16 Scandit in his analysis is because [REDACTED]

11:02 17 [REDACTED]. Google produced some documents  
11:02 18 indicating [REDACTED]

11:03 19 [REDACTED], which  
11:03 20 leverages the accused technology of barcode scanning.

11:03 21 And you can see on the bottom of the  
11:03 22 screen the two documents -- or the two screenshots  
11:03 23 there are from the same document [REDACTED]

11:03 24 [REDACTED]  
11:03 25 [REDACTED]

11:03 1 Mr. Blok looked up the website for  
11:03 2 Scandit in the -- in a previous year. And the Scandit  
11:03 3 technology -- the pricing for the Scandit technology  
11:03 4 was listed on its website.

11:03 5 THE COURT: Okay. Anything else?

11:03 6 MS. RUIZ: So eventually to get to that  
11:03 7 reasonable royalty rate per scan, so we've reached  
11:04 8 that, he started off with a base price value from  
11:04 9 Scandit. We talked about the [REDACTED]  
11:04 10 [REDACTED]. And Mr. Blok also applied a  
11:04 11 split of economic value.

11:04 12 Would Your Honor like to hear about the  
11:04 13 split of economic value?

11:04 14 THE COURT: Yes.

11:04 15 MS. RUIZ: Okay. Mr. Blok's split of  
11:04 16 economic value was [REDACTED]. Earlier opposing  
11:04 17 counsel indicated that this was an arbitrary number. I  
11:04 18 think it was like a Nash kind of value. However, that  
11:05 19 has nothing to do with how Mr. Blok chose [REDACTED].

11:05 20 First, he applied the facts to -- he  
11:05 21 applied his calculations to the facts of the case. He  
11:05 22 took the entire balance of the Georgia-Pacific factors  
11:05 23 and he found that Brazos and Google's would have  
11:05 24 possessed similar leverage at the time of the  
11:05 25 hypothetical negotiation from his analysis of the

11:05 1 Georgia-Pacific factors.

11:05 2 And from there he determined that there  
11:05 3 would be a [REDACTED] between Brazos and Google in the  
11:05 4 hypothetical negotiation. In addition, as you can see,  
11:05 5 the -- we have a second point and a third point -- or  
11:05 6 excuse me -- two different paragraphs below. Mr. Blok  
11:05 7 also looked to two different points in addition to the  
11:05 8 [REDACTED] split.

11:05 9 On the second paragraph that you see, he  
11:05 10 considered Google's weighted average ROIC percentage  
11:06 11 spanning the licensing periods to date. In his  
11:06 12 Exhibit 7, he goes through Google's return on  
11:06 13 investment capital from the years 2019 to 2022. From  
11:06 14 there he determined that there would be a [REDACTED]

11:06 15 [REDACTED]  
11:06 16 He also considered a third point which  
11:06 17 included third-party mobile applications that are  
11:06 18 commercialized through Google's mobile application  
11:06 19 store, and he determined that the split would be  
11:06 20 between [REDACTED] of the revenues  
11:06 21 generated.

11:06 22 So Mr. Blok didn't just choose a [REDACTED]  
11:06 23 split. He looked at the Georgia-Pacific factors and  
11:06 24 summary. He also looked at this [REDACTED] and  
11:06 25 a [REDACTED] split data point, and he chose the most

11:06 1 conservative point, which gave Google the -- the  
11:07 2 highest percentage split, which was the [REDACTED]  
11:07 3 [REDACTED].

11:07 4 And from there, Your Honor, in order to  
11:07 5 get to the [REDACTED]  
11:07 6 value --

11:07 7 THE COURT: I'm good. You've covered  
11:07 8 what I wanted.

11:07 9 MS. RUIZ: Okay. All right. Thank you,  
11:07 10 Your Honor. Is there anything else?

11:07 11 THE COURT: No.

11:07 12 MS. RUIZ: All right. Thank you, Your  
11:07 13 Honor.

11:07 14 THE COURT: Anything else from Google?

11:07 15 MR. JONES: Again, Mike Jones for Google.  
11:07 16 I would like to very pointedly address  
11:07 17 the questions the Court asked, first with regard to the  
11:07 18 580 case, what we just heard from my colleague.

11:07 19 The question the Court asked was about  
11:07 20 the royalty base, you know, and really what she  
11:07 21 answered about was the royalty rate. Which is the way  
11:07 22 Mr. Blok's opinion works in the 580 case is you take a  
11:07 23 rate of [REDACTED] multiply it by a number of scans.

11:08 24 And there is no dispute, you heard no dispute from the  
11:08 25 plaintiff, that those number of scans are all scans

11:08 1 that occurred after April of 2019 when [REDACTED] came  
11:08 2 out.

11:08 3 But the evidence before the Court -- and  
11:08 4 again, it's pointed out in our papers, and I don't  
11:08 5 think there's been any dispute made of it today -- is  
11:08 6 that [REDACTED] continued to be used after that  
11:08 7 date. So when [REDACTED] continued to be used after  
11:08 8 that date, when [REDACTED] after the close of fact  
11:08 9 discovery, no longer became a accused product, we enter  
11:08 10 into the situation where we know, we know for a fact  
11:08 11 that nonaccused products are being included in the  
11:09 12 royalty base.

11:09 13 And there has been no effort after  
11:09 14 [REDACTED] out, and after we know [REDACTED] is  
11:09 15 still in play -- and again, I'm talking about the  
11:09 16 [REDACTED] only product -- there's been no attempt to  
11:09 17 take them out, and that's a fatal flaw with regard to  
11:09 18 Mr. Blok's opinion that cannot be cured by  
11:09 19 cross-examination.

11:09 20 Moving to the 585 case and the question  
11:09 21 asked by the Court. The question asked by the Court  
11:09 22 was: Where does the [REDACTED] figure come where  
11:09 23 they're due the apportionment for the technical  
11:09 24 functionality in this case? Could we go --

11:09 25 Could y'all put up your Slide 22 again,

11:09 1 that Mr. Love used?

11:09 2 (Off-the-record discussion.)

11:09 3 MR. JONES: Switching gears now to the

11:09 4 585.

11:09 5 Now, when he first -- you first asked him

11:10 6 about the [REDACTED], and he first talked about

11:10 7 [REDACTED]. And he talked

11:10 8 about how they were used and how they were part of

11:10 9 Google Maps Mobile, he didn't really answer your

11:10 10 question because none of that data comes in question

11:10 11 with regard to the [REDACTED].

11:10 12 The [REDACTED] comes from this. It comes

11:10 13 from looking at certain [REDACTED] and looking at the

11:10 14 [REDACTED] and how these particular features

11:10 15 are discussed in certain Google documents and then

11:10 16 using them -- and these are the exact words of

11:10 17 Mr. Blok -- as a proxy for the patented technology.

11:10 18 So he tells us, I'm going to look at

11:10 19 these things, I'm going to look how Google uses these

11:11 20 things, and I am going to use them as a proxy for the

11:11 21 patented functionality. Now, keep in mind, full stop,

11:11 22 these [REDACTED] are not accused of infringement. The

11:11 23 [REDACTED], is not accused of

11:11 24 infringement. This is not the patented technology

11:11 25 we're dealing with in this suit. So how can he do

11:11 1 that? How can he use something that is not the  
11:11 2 patented technology and use it for a proxy?

11:11 3 He tells us in Paragraph 209 of his  
11:11 4 report: In order to determine the portion of Google's  
11:11 5 realizable incremental profit or benefit that would be  
11:11 6 directly attributable to the teachings of the  
11:11 7 patent-in-suit, I asked Dr. Budavári to review various  
11:11 8 documents produced by Google during the course of this  
11:11 9 litigation that appear to provide indications of the  
11:11 10 contribution value of the accused functionality.

11:11 11 He's relying upon Dr. Budavári. He  
11:12 12 didn't do it. I can't cross-examine him about how he  
11:12 13 came up with this [REDACTED] because he relied on  
11:12 14 Dr. Budavári, and the Court has stricken that opinion.

11:12 15 So if we could, let's go to Slide -- one  
11:12 16 more time, let's go to Slide 10.

11:12 17 Oh, excuse me. Go to Slide 10 of our  
11:12 18 slide deck. I'm sorry. I apologize.

11:12 19 Thank you so much.

11:12 20 This is their four steps. Step 3 is the  
11:12 21 [REDACTED]. And that's where we get down to the  
11:12 22 patented functionality. That is gone. Because they  
11:12 23 relied on an [REDACTED] and they relied on [REDACTED] that are based  
11:12 24 upon Dr. Budavári's opinion.

11:12 25 Mr. Blok didn't know that. Mr. Blok

11:13 1 doesn't say, oh, I could say that I could use these and  
11:13 2 analyze these somehow and come up with the [REDACTED].  
11:13 3 No. He says Dr. Budavári did that. You've stricken  
11:13 4 that opinion.

11:13 5 Step 4 deals with an overall company net  
11:13 6 income and invested capital return, which is certainly  
11:13 7 much, much more broad than the patented technology.  
11:13 8 The only way, the only way they get there is to look at  
11:13 9 these app developers, and those are, again, based upon  
11:13 10 Dr. Budavári.

11:13 11 So apportionment has not been done. They  
11:13 12 admit they had to do apportionment. And here we see it  
11:13 13 hasn't been done due to the fact that they have nothing  
11:13 14 to base their opinions upon with regard to this  
11:13 15 apportionment due to the striking of Dr. Budavári's  
11:13 16 opinion.

11:13 17 Thank you, Your Honor.

11:13 18 THE COURT: Okay.

11:13 19 Yes, sir?

11:13 20 MR. LOVE: Your Honor, can I take the 585  
11:13 21 issues --

11:13 22 THE COURT: Yes, please.

11:13 23 MR. LOVE: -- that Mr. Jones raised?

11:14 24 THE COURT: I thought I heard you suggest  
11:14 25 an alternative to what I've stricken in your earlier

11:14 1 argument.

11:14 2 MR. LOVE: This is correct. This is  
11:14 3 correct.

11:14 4 THE COURT: Okay.

11:14 5 MR. LOVE: Mr. Jones, if you could pull  
11:14 6 up Slide 10.

11:14 7 MR. JONES: Sure.

11:14 8 MR. LOVE: So I think the issue is that  
11:14 9 Mr. Jones is conflating the source of the percentages.  
11:14 10 In Mr. Blok's report, and what the Court addressed  
11:14 11 earlier this morning with respect to the [REDACTED], which we  
11:14 12 readily admit, those are -- you know, those are  
11:14 13 separate products with their own universe and their own  
11:14 14 teams that put them out on the market, and third  
11:14 15 parties use those.

11:14 16 That's where -- that's where the  
11:14 17 [REDACTED] that Mr. Blok utilized in his report  
11:14 18 came from, with respect to the Google [REDACTED].

11:14 19 The [REDACTED] that was actually used in  
11:15 20 his analysis, and you can see it in Google's  
11:15 21 illustration here in Step 3, they reference the  
11:15 22 [REDACTED]. But they don't reference the [REDACTED]  
11:15 23 anywhere in the slide. And they conflate the two  
11:15 24 concepts in order to convince the Court that the  
11:15 25 [REDACTED] should be struck. But the [REDACTED] --

11:15 1 Ms. Ruiz, if you'll look -- if you will  
11:15 2 pull up Slide No. 22.

11:15 3 If you look at Slide 22, which we  
11:15 4 provided to the Court, we clearly separate the two  
11:15 5 concepts. The [REDACTED] is tied to the Google [REDACTED]  
11:16 6 which the Court did not agree with and the Court  
11:16 7 addressed this morning.

11:16 8 The [REDACTED], which is tied to the  
11:16 9 [REDACTED] monicker and tied to Google's  
11:16 10 documents, that is the apportionment factor that was  
11:16 11 applied in the 585 case; and that the Court should find  
11:16 12 reasonable in the way that it was utilized in this case  
11:16 13 and the fact it was based on Google's documents and  
11:16 14 Dr. Budavári's opinion with respect to the  
11:16 15 technological comparability in his report.

11:16 16 And if the Court has any other questions  
11:16 17 on that?

11:16 18 THE COURT: I don't.

11:16 19 MR. LOVE: Thank you, Your Honor.

11:16 20 MS. RUIZ: Your Honor, a response on the  
11:16 21 580?

11:16 22 THE COURT: I don't need it.

11:16 23 (Off-the-record bench conference.)

11:17 24 THE COURT: If there's anything else the  
11:17 25 plaintiff would like to add on the 580 case, I'm happy

11:17 1 to hear it.

11:17 2 MS. RUIZ: Hello again, Your Honor. Hi.

11:18 3 So as we heard Mr. Jones once again

11:18 4 talking about how Google accuses Mr. Blok of not

11:18 5 factoring out the nonaccused [REDACTED]

11:18 6 technology, and I want to bring up again that he does

11:18 7 factor out the -- this technology because it's a

11:18 8 percent attributable to the patent-in-suit at

11:18 9 [REDACTED] He saw from Google's own documentation,

11:18 10 Google's own experimentation with [REDACTED], and he

11:18 11 calculated that the improvement from -- or the

11:18 12 incremental benefit from [REDACTED] would be

11:18 13 [REDACTED].

11:18 14 Furthermore, Mr. Blok only considers

11:18 15 scans in the United States and not worldwide.

11:19 16 Mr. Jones is confusing the steps. And further, I think

11:19 17 there might have been some confusion on what was done

11:19 18 in the 580 versus 585, and so there was a little bit of

11:19 19 mix of that.

11:19 20 In the end, the steps that Mr. Blok took

11:19 21 in order to create a [REDACTED] are

11:19 22 clearly laid out in his report. He used documentation

11:19 23 and data from Google's produced documents, and if

11:19 24 Google does not agree with how he calculated a

11:19 25 particular item, they can cross-examine him during

11:19 1 trial.

11:19 2 If there's anything else? All right.

11:19 3 Thank you, Your Honor.

11:19 4 THE COURT: Mr. Jones, I don't think  
11:19 5 you're confusing those, but I'll give you a chance  
11:19 6 to --

11:19 7 MR. JONES: Excuse me?

11:19 8 THE COURT: I don't think you're  
11:19 9 confusing those numbers. I have concerns about whether  
11:19 10 or not domestic or global numbers were used. If  
11:20 11 there's anything you'd like to add on the record in  
11:20 12 that regard.

11:20 13 MR. JONES: No, Your Honor. I don't.  
11:20 14 Again, I think it's a royalty base issue, as the Court  
11:20 15 has stated. And I think we've demonstrated that it's  
11:20 16 not -- what she just talked about was with regard to  
11:20 17 the application or the determination of the royalty  
11:20 18 rate. That's a -- that's a different question that we  
11:20 19 really haven't been talking about here today in our  
11:20 20 argument.

11:20 21 What I'm directing my attention to is the  
11:20 22 royalty base.

11:20 23 THE COURT: So as I understand it, your  
11:20 24 concern is whether or not -- and this is my word, you  
11:20 25 probably would have a better one -- but they didn't

11:20 1 sufficiently sift with regard to the [REDACTED]  
11:20 2 They didn't --  
11:20 3 MR. JONES: Right. Right. They didn't  
11:20 4 sift to that when that issue came up.  
11:20 5 THE COURT: And then also having -- they  
11:20 6 didn't use, in your opinion, a reliable proxy with  
11:20 7 respect to the division between the domestic and the  
11:20 8 global numbers.  
11:21 9 MR. JONES: Yes, Your Honor.  
11:21 10 THE COURT: Those are your two points.  
11:21 11 MR. JONES: Yeah. With regard to the 580  
11:21 12 case. Yes, Your Honor.  
11:21 13 THE COURT: Right. Let me make it clear,  
11:21 14 just regard to the 580.  
11:21 15 MR. JONES: Okay. Okay.  
11:21 16 THE COURT: Yes.  
11:21 17 Did I summarize what you were saying?  
11:21 18 MR. JONES: Yeah. Can I turn to the 585,  
11:21 19 or do you not want to hear that?  
11:21 20 THE COURT: I don't need to hear it. I'm  
11:21 21 fine.  
11:21 22 So with respect to the 585, I'm going to  
11:21 23 deny the defendant's motion. But with respect to the  
11:21 24 580 patent (sic), I'm going to grant the motion.  
11:21 25 Now, I've been through this before. And

11:21 1 it's -- it seems to me -- I could be wrong. I'll hear  
11:21 2 from plaintiff's counsel. It seems to me that this  
11:21 3 makes your -- plaintiff, your damages case very  
11:21 4 difficult on the 580 with the report as it's currently  
11:21 5 constituted; is that fair?

11:22 6 MR. SIEGMUND: It might make it a little  
11:22 7 difficult, Your Honor.

11:22 8 THE COURT: Well, no. Here's what I'm --  
11:22 9 I'm not -- I'm really not kidding.

11:22 10 Here's my question, is, I've had this  
11:22 11 situation where I've essentially gutted the plaintiff's  
11:22 12 argument on damages, and that doesn't work out well for  
11:22 13 anyone because I now have a plaintiff who's saying, I  
11:22 14 get damages but I can't prove damages. And so the case  
11:22 15 just kind of flounders.

11:22 16 So I will give you all -- if you all want  
11:22 17 to do a different damages opinion, you have two  
11:22 18 choices. You could either say I'm wrong in what I'm  
11:22 19 doing and, you know, you could take it up, or -- and  
11:22 20 that's fine, or you can say because there are two  
11:22 21 trials -- and this is me speaking -- because there are  
11:23 22 two trials in this case, we could kick the 580 patent  
11:23 23 (sic) to the second trial. And I would give you all an  
11:23 24 opportunity to redo the damages report if you would  
11:23 25 rather do that. And I'll -- is that something you all

11:23 1 would prefer to do?

11:23 2 MR. SIEGMUND: I think that's probably  
11:23 3 right. But could you just give us a few minutes to  
11:23 4 just quickly confer? But I'm thinking that's probably  
11:23 5 the option we'll choose, Your Honor. But I just want  
11:23 6 to confirm with the team.

11:23 7 THE COURT: What I have left are -- let  
11:23 8 me take this up -- why don't we do this? Because I'd  
11:23 9 like to, if we can, get finished with these.

11:23 10 I think all we have left is the motion  
11:23 11 for -- Google's motion for partial summary judgment.

11:23 12 MR. SIEGMUND: And that is on the 580  
11:23 13 case, Your Honor, if that makes a difference for you.

11:23 14 THE COURT: Why don't we take a short  
11:23 15 recess? And -- I need one anyway. And the plaintiff  
11:24 16 can tell me what to do. And my intention would be  
11:24 17 probably if you -- but I'll hear from -- y'all can sit  
11:24 18 down.

11:24 19 Here's what I probably would do: If the  
11:24 20 plaintiff is going to kick the -- if you want a do-over  
11:24 21 and we're going down, I would ask Google whether you  
11:24 22 want to go ahead and argue the motion now on the 580 or  
11:24 23 if you want to wait till a different pretrial  
11:24 24 conference. And I'm agnostic. I'll do either one.

11:24 25 So you all -- you all figure out what you

11:24 1 want to do. And then Google -- I'll take up whatever  
11:24 2 Google wants me to do on the other.

11:24 3 THE BAILIFF: All rise.

11:24 4 (Recess taken.)

11:33 5 THE BAILIFF: All rise.

11:33 6 THE COURT: Thank you. You may be  
11:33 7 seated.

11:33 8 Okay. Mr. Siegmund?

11:34 9 MR. SIEGMUND: Yes, Your Honor. I think,  
11:34 10 big surprise to the Court, we're going to take  
11:34 11 Option 2. And we'll come up with a timeline to work  
11:34 12 with Google and get that figured out with the next  
11:34 13 pretrial conference and trial date.

11:34 14 THE COURT: Okay.

11:34 15 MR. SIEGMUND: And then whatever the  
11:34 16 Court wants to do on the 580 is fine with us in terms  
11:34 17 of the one remaining motion.

11:34 18 THE COURT: Do you want to go ahead and  
11:34 19 argue it?

11:34 20 MR. LANIER: Very briefly, Your Honor. I  
11:34 21 just want to make a couple of other points as well.

11:34 22 THE COURT: Okay.

11:34 23 MR. LANIER: So while we're doing the  
11:34 24 mechanics of pulling up some slides on the 580 motion  
11:34 25 for summary judgment of noninfringement, Your Honor, I

11:34 1 just want to be sure we understand the record before  
11:34 2 the Court puts pen to paper.

11:34 3 Our understanding of the Court's ruling  
11:34 4 on technical comparability, our Daubert there was  
11:34 5 striking Paragraphs 208 through 213.

11:34 6 THE COURT: Correct.

11:34 7 MR. LANIER: Specifically confirmed on  
11:34 8 the record.

11:34 9 THE COURT: Yes.

11:34 10 MR. LANIER: And the Court may recall  
11:34 11 from -- we wanted to make sure there was no confusion.  
11:34 12 Because in the discussion on the 585 Daubert on  
11:34 13 damages, that [REDACTED] issue is Paragraph 213, that was  
11:35 14 struck.

11:35 15 So we'd ask the Court -- just,  
11:35 16 respectfully, we understand the Court's made a ruling,  
11:35 17 but we'd ask the Court to consider that in light of the  
11:35 18 confirmed ruling on technical comparability on the 585  
11:35 19 case before the Court puts pen to paper.

11:35 20 So just wanted to make sure that was  
11:35 21 clear so we have a clear record going forward.

11:35 22 THE COURT: That's fine.

11:35 23 MR. LANIER: Thank you, Your Honor.

11:35 24 Then with respect to the '491, I think  
11:35 25 the reason that we'd like to be heard on it briefly now

11:35 1 is twofold. One is, it's a very straightforward  
11:35 2 motion. The other is, at present, we'd have three  
11:35 3 patents for that second trial. And I don't think  
11:35 4 anyone's in a position to pull one up to the earlier  
11:35 5 trial because witnesses are available when they're  
11:35 6 available. So it might be useful if the Court has time  
11:35 7 to consider this motion.

11:35 8 THE COURT: No. I --

11:35 9 MR. LANIER: We'll present it and see  
11:35 10 what the Court thinks.

11:35 11 THE COURT: I'd be happy to.

11:35 12 MR. LANIER: Thank you. Appreciate that.

11:35 13 So let's just turn to Slide No. 2.

11:35 14 So, Your Honor, this '491 patent relates  
11:35 15 to barcode scanning. It's not just any barcode  
11:35 16 scanning. It's a specific method of doing barcode  
11:36 17 scanning that reflects the very old technology from way  
11:36 18 back when, when this patent was filed, back in the 2000  
11:36 19 aughts, when cameras were different, phones were  
11:36 20 different.

11:36 21 And it requires that you do two things:  
11:36 22 You take a picture of that image, you process that  
11:36 23 image, make sure you got a good picture, and then you  
11:36 24 go try to decode it. There's two big steps there.

11:36 25 Now, if you don't have a good picture,

11:36 1 you might switch to a different way of taking the  
11:36 2 picture. That's the first switch that we've  
11:36 3 illustrated here from both the claim language and  
11:36 4 Figure 6.

11:36 5 The second thing you do then is you try  
11:36 6 to decode it, but if you can't decode it, well, then  
11:36 7 you try a different method of decoding.

11:36 8 So what's critical here on the '491  
11:36 9 patent is to keep in mind that it's not just trying  
11:36 10 different methods to get to the right result. It's  
11:36 11 specifically if you don't get good image processing,  
11:36 12 try different image processing. And if you don't get  
11:36 13 good decoding, try different decoding.

11:36 14 And that is from the claim language  
11:37 15 determining whether processing of the input image is  
11:37 16 successful based on a determination as to whether the  
11:37 17 correction is completed, and then you do that -- what  
11:37 18 we call the first switch, which we're just doing for  
11:37 19 shorthand.

11:37 20 So then the question is: What is the  
11:37 21 image processing that's relevant here?

11:37 22 Let's turn to Slide 3.

11:37 23 This is from their expert Dr. Kozek.  
11:37 24 This is his report. And he says that: The image  
11:37 25 processing is [REDACTED]. That

11:37 1 is, you center it -- that's the [REDACTED]

11:37 2 [REDACTED] -- and then you [REDACTED]

11:37 3 [REDACTED]

11:37 4 That is what Dr. Kozek at Docket 180,

11:37 5 Exhibit F, Paragraphs 7 and 9 of his report and,

11:37 6 similarly, in several other places, that's how he

11:37 7 defines the image processing.

11:37 8 So now let's go back to Slide 2 for a

11:37 9 minute because that's the claim language.

11:37 10 So that first switch takes place, that

11:38 11 Claim Element No. 3, switching to one of a different

11:38 12 barcode-reading method in response to the processing of

11:38 13 the image -- input image being unsuccessful.

11:38 14 So that switch that happens, that trying

11:38 15 of a new method, is if the image processing fails. And

11:38 16 we know --

11:38 17 Slide 3.

11:38 18 -- that image processing is the affine

11:38 19 and crop.

11:38 20 So then the question is: What does

11:38 21 Google do if [REDACTED] doesn't happen successfully?

11:38 22 Let's go to Slide 4.

11:38 23 Well, we know what Dr. Kozek says. If

11:38 24 it's true, you just go to the next step. So you don't

11:38 25 do a switch. You go to the next steps and you move on.

11:38 1 That's summarized on our Slide 4, but it's from  
11:38 2 Dr. Kozek's report at Paragraphs 141, 188, and 195.

11:38 3 The question, though, because this  
11:38 4 element relates to what happens if the switch -- if the  
11:38 5 image processing, nothing else, image processing is  
11:38 6 unsuccessful, is what happens if it fails?

11:38 7 Let's go to the next slide.

11:38 8 And that's from Paragraph 170 of his  
11:39 9 report: Upon the failure of the [REDACTED]

11:39 10 [REDACTED] -- again, that's the image processing --  
11:39 11 false is returned.

11:39 12 And he's referring to the source code  
11:39 13 there and a function called [REDACTED] Was it true?  
11:39 14 Was it false? If it is true, it worked. You move on.  
11:39 15 If it's false, you try something different.

11:39 16 That would be the first switch on failure  
11:39 17 of image processing. But that first switch never  
11:39 18 happens in Google's products, and Dr. Kozek actually  
11:39 19 admits it.

11:39 20 Let's go to Slide 6.

11:39 21 This is his deposition testimony, again,  
11:39 22 referring to Paragraph 170, where he says: This is  
11:39 23 when the switch would happen.

11:39 24 And it's worth emphasizing that: Upon  
11:39 25 the failure of the [REDACTED]

11:39 1 [REDACTED] [REDACTED]  
11:39 2 [REDACTED]  
11:39 3 So the barcode, the switch happens if  
11:39 4 the -- if the source code [REDACTED] if it didn't  
11:40 5 work. But it [REDACTED] [REDACTED]  
11:40 6 It's [REDACTED]  
11:40 7 [REDACTED]  
11:40 8 [REDACTED] [REDACTED]  
11:40 9 [REDACTED] So there cannot be a switch in  
11:40 10 response to a failure if [REDACTED].  
11:40 11 The -- there is never a switch upon a failure of the  
11:40 12 image processing.  
11:40 13 Let's just skip to Slide 8.  
11:40 14 So we put the big red X to illustrate  
11:40 15 there that there is no switch, but the reason there is  
11:40 16 no switch, that first switch doesn't happen because the  
11:40 17 specific step from which it would be switching, the  
11:40 18 using of that image -- or the conducting the image  
11:40 19 processing, [REDACTED]  
11:40 20 Again, put this patent in context, it's  
11:40 21 old. It's older cameras. They didn't work quite so  
11:40 22 well. Cameras and everything else have moved along.  
11:40 23 Google always skips that step.  
11:41 24 Now, you're going to hear a lot in  
11:41 25 response about, well, there's [REDACTED]

11:41 1 and everything else. And there might be switches that  
11:41 2 happen there, but that is always after an attempt to  
11:41 3 [REDACTED] which is not that image  
11:41 4 processing.

11:41 5 Dr. Kozek defined image processing as a  
11:41 6 [REDACTED] That's that first step. [REDACTED] is the  
11:41 7 image processing under this patent claim under the '491  
11:41 8 patent. The third element, you only -- you do that  
11:41 9 switch if that [REDACTED] It [REDACTED]

11:41 10 Now, they refer to --

11:41 11 Let's go to Slide 9.

11:41 12 We'll hear -- I'm sure we're going to  
11:41 13 hear about, look, well, what happens if [REDACTED]  
11:41 14 [REDACTED] You do some other image  
11:41 15 processing. But the point is, that's not what the  
11:41 16 patent claims. That's what Google does. But that's  
11:41 17 not what the patent claims.

11:41 18 The patent claim says process the image,  
11:41 19 then if that fails, try to process the image a  
11:42 20 different way. Then try to decode.

11:42 21 Google's system is different. [REDACTED]

11:42 22 [REDACTED] In a  
11:42 23 nutshell, that is the difference.

11:42 24 It is very straightforward. And  
11:42 25 everything Your Honor is about to hear relates to after

11:42 1 trying to [REDACTED], not that first thing  
11:42 2 that their own expert defined as image-processed.

11:42 3 I'll stop there for the moment, Your  
11:42 4 Honor. Thank you.

11:42 5 MR. DEWBERRY: Good morning, Your Honor.

11:42 6 Tim Dewberry with Folio Law Group. Good to see you  
11:42 7 again.

11:42 8 I'm going to briefly respond to the  
11:42 9 points that Mr. Lanier made.

11:43 10 I think the parties actually are in  
11:43 11 remarkable agreement about what the claim requires  
11:43 12 here. But there is definitely disagreement about how  
11:43 13 Google's system works. And interestingly enough, I  
11:43 14 think that Mr. Lanier's position is contradicted not  
11:43 15 only by Dr. Kozek but his own expert, as we'll  
11:43 16 demonstrate.

11:43 17 And I did want to apologize in advance.  
11:43 18 There's a lot of source code in here. There's a lot of  
11:43 19 talking about code. It may be a bit tedious. But  
11:43 20 please, Your Honor, if there was anything before I  
11:43 21 start marching down this road that you wanted me to hit  
11:43 22 first, happy to do so; otherwise, I will start  
11:43 23 marching, and please feel free to stop me whenever  
11:43 24 you'd like.

11:43 25 THE COURT: March away.

11:43 1 MR. DEWBERRY: All right. Let's start.  
11:43 2 MR. LANIER: Can we just briefly ask to  
11:43 3 go on the confidential record for this, please? The  
11:43 4 room is fine with the people in it, but if we can go on  
11:43 5 the confidential record.

11:43 6 That's one of my partners back there.

11:43 7 MR. DEWBERRY: That was the only person I  
11:43 8 wasn't quite sure about.

11:43 9 MR. LANIER: Understood.

11:44 10 MR. DEWBERRY: He looks trustworthy,  
11:44 11 though.

11:44 12 (Sealed proceedings.)

11:44 13 [REDACTED] [REDACTED]  
11:44 14 [REDACTED] [REDACTED]  
11:44 15 [REDACTED]  
11:44 16 [REDACTED] [REDACTED]  
11:44 17 [REDACTED] [REDACTED]  
11:44 18 [REDACTED]  
11:44 19 [REDACTED]  
11:44 20 [REDACTED] [REDACTED]  
11:44 21 [REDACTED]  
11:44 22 [REDACTED] [REDACTED]  
11:44 23 [REDACTED]  
11:44 24 [REDACTED]  
11:44 25 [REDACTED]

11:44 1 [REDACTED] [REDACTED]  
11:44 2 [REDACTED]  
11:44 3 [REDACTED]  
11:44 4 [REDACTED]  
11:44 5 [REDACTED] [REDACTED]  
11:45 6 [REDACTED]  
11:45 7 [REDACTED] [REDACTED] [REDACTED]  
11:45 8 [REDACTED]  
11:45 9 [REDACTED] [REDACTED]  
11:45 10 [REDACTED] [REDACTED]  
11:45 11 [REDACTED] [REDACTED]  
11:45 12 [REDACTED]  
11:45 13 [REDACTED] [REDACTED]  
11:45 14 [REDACTED]  
11:45 15 [REDACTED] [REDACTED]  
11:45 16 [REDACTED] [REDACTED]  
11:45 17 [REDACTED]  
11:45 18 [REDACTED] [REDACTED] [REDACTED]  
11:45 19 [REDACTED] [REDACTED]  
11:45 20 [REDACTED]  
11:45 21 [REDACTED] [REDACTED] [REDACTED]  
11:45 22 [REDACTED] [REDACTED]  
09:42 23 (Sealed proceedings end.)  
11:45 24 THE COURT: Okay. Why don't we do this?  
11:45 25 I don't think I can get through all of this before

11:45 1 noon. And I don't want to rush it. Why don't we --  
11:45 2 let me do this. Let me get through the first three  
11:46 3 Brazos motions in limine and then we will take our  
11:46 4 lunch break.

11:46 5 MR. DEWBERRY: Very good, Your Honor.

11:46 6 THE COURT: Okay.

11:46 7 MR. DEWBERRY: I believe that's someone  
11:46 8 other than me.

11:46 9 THE COURT: No one's arguing.

11:46 10 MR. DEWBERRY: Thank you, Your Honor.

11:46 11 THE COURT: And so the first motion is to  
11:46 12 preclude Google from presenting the deposition  
11:46 13 testimony of its own corporate representative during  
11:46 14 its case-in-chief.

11:46 15 Actually, I guess I do -- what does  
11:46 16 Google intend to do with this?

11:46 17 MR. LANIER: Your Honor, Mr. Jones will  
11:46 18 address that.

11:46 19 MR. JONES: Thank you, Your Honor.

11:46 20 I think their position is that we can't  
11:46 21 call, in our case, Google witnesses by way of  
11:46 22 depositions that are beyond the subpoena power of the  
11:46 23 Court, beyond 100 miles.

11:46 24 Basically, you know, the Federal Rules of  
11:46 25 Civil Procedure say we can. The Federal Rules of Civil

11:47 1 Procedure say: A party may use for any purpose the  
11:47 2 deposition of a witness, whether or not a party, if the  
11:47 3 Court finds the witness is more than 100 miles from the  
11:47 4 place of hearing or trial.

11:47 5 And all of these witnesses --

11:47 6 THE COURT: So as long as -- here's what  
11:47 7 I'm -- here's why I didn't understand it and why I  
11:47 8 asked you to speak. These aren't corporate 30(b)(6)  
11:47 9 depositions.

11:47 10 MR. JONES: No.

11:47 11 THE COURT: This is a deposition of Mike  
11:47 12 Smith, Google employee.

11:47 13 MR. JONES: Right. Google employees.

11:47 14 THE COURT: And you'd rather play -- they  
11:47 15 took his deposition.

11:47 16 MR. JONES: Right.

11:47 17 THE COURT: You'd rather play the  
11:47 18 deposition than call him live.

11:47 19 MR. JONES: Right.

11:47 20 THE COURT: I'm fine with that.

11:47 21 MR. ABRAHAM: Your Honor, if I may. They  
11:47 22 are 30(b)(6) depositions.

11:47 23 THE COURT: Well, a 30(b)(6) deposition,  
11:47 24 either side gets to play regardless -- that's why I was  
11:47 25 trying to figure this out. So 30(b)(6), they

11:47 1 absolutely get to play it. It's a 30(b)(6), it's not a  
11:47 2 witness. It's not a human. It's a 30(b)(6)  
11:47 3 deposition.

11:47 4 If it's that, then either side gets to  
11:47 5 play any 30(b)(6) whenever they want. If it's -- but  
11:48 6 if -- to Mr. Jones' point, if it's Mike Jones, Google  
11:48 7 engineer, who just doesn't want to come here, and he's  
11:48 8 outside of 100 miles and you want to play his  
11:48 9 deposition rather than have him come here, I'm fine  
11:48 10 with that too.

11:48 11 MR. JONES: Thank you, sir.

11:48 12 THE COURT: Motion in Limine No. 2 is:  
11:48 13 To preclude evidence, testimony, or argument regarding  
11:48 14 the presence or absence at trial of any of the  
11:48 15 inventors of the asserted patents.

11:48 16 So here's what I'm going to do on this.  
11:48 17 I'm going to hear what the -- I'm going to grant the  
11:48 18 motion in limine on this. In other words, you have to  
11:48 19 approach. I'm not excluding it. I'm going to listen  
11:48 20 to what the plaintiff says and determine whether or  
11:48 21 not -- and let me give you an example. Because I've  
11:48 22 done this.

11:48 23 If the plaintiff indicates that this was  
11:48 24 the greatest patent that ever happened and how -- how  
11:49 25 phenomenally important it was to the inventor and gives

11:49 1 the jury that impression, and then the inventor isn't  
11:49 2 called, you get to talk about that. If they just -- if  
11:49 3 the inventor's never mentioned by them, then the fact  
11:49 4 that he didn't show up is not going to come in.

11:49 5 So essentially, it will be an -- there's  
11:49 6 a motion in limine unless the plaintiff opens the door  
11:49 7 and I think gives Google a fair reason to point out  
11:49 8 that the inventor is not, in fact, there; otherwise, it  
11:49 9 won't be relevant to me.

11:49 10 No. 3: To preclude evidence, testimony,  
11:49 11 or argument suggesting a party's corporate  
11:49 12 representative at trial is obligated to prepare on a  
11:49 13 particular topic or is in charge of knowledge of  
11:49 14 others.

11:49 15 I don't really know what this means, but  
11:49 16 it doesn't sound like it should be done. I don't know  
11:49 17 what it means. I'm denying it. I don't know what it  
11:49 18 means.

11:49 19 So I've been through a lot of trials, and  
11:50 20 I don't know what it means.

11:50 21 MR. SIEGMUND: Your Honor, would you like  
11:50 22 to -- or just keep moving? Because this exact MIL was  
11:50 23 granted in the previous trial as well as in --

11:50 24 THE COURT: What does it mean?

11:50 25 MR. SIEGMUND: Right, Your Honor. So all

11:50 1 we're trying to say is that Google should be prevented  
11:50 2 from suggesting that our corporate rep, who's going to  
11:50 3 be at trial, know everything about the company and  
11:50 4 every single facet under there. Because we had  
11:50 5 previous people who testified, and we don't think it'd  
11:50 6 be fair for them to suggest that she doesn't know what  
11:50 7 someone else testified to. That's it.

11:50 8 THE COURT: If -- okay. I get it.

11:50 9 MR. SIEGMUND: Okay.

11:50 10 THE COURT: If they ask a question along  
11:50 11 these lines you think is irrelevant, just object it's  
11:50 12 irrelevant.

11:50 13 MR. SIEGMUND: Understood, Your Honor.

11:50 14 THE COURT: And so -- and this is both  
11:50 15 ways. You know, when the Google person gets on. You  
11:50 16 know, if the Google person thinks the cross is  
11:50 17 objectionable, you can object. I think the jury will  
11:50 18 survive hearing the question and hearing the objection  
11:51 19 and won't be scarred by it.

11:51 20 I'll go ahead and let me see if I can get  
11:51 21 through a couple more of these.

11:51 22 Plaintiff and its experts should be  
11:51 23 precluded from testifying about or referring to  
11:51 24 licensing negotiations given that plaintiff denied  
11:51 25 Google discovery of such information.

11:51 1 So specifically what, from Google's  
11:51 2 perspective, are they worried that plaintiff is going  
11:51 3 to be talking about regarding licensing negotiations  
11:51 4 that you did not get?

11:51 5 MR. GARCIA: Sure, Your Honor. Their  
11:51 6 damages expert wants to color some of the negotiations  
11:51 7 behind the transferring of the patents and the  
11:51 8 purchasing of the patents and licensing of the patents.  
11:51 9 We were never allowed to get any discovery behind those  
11:51 10 negotiations, so their expert's trying to bootstrap  
11:51 11 that with conversations with some of the corporate  
11:51 12 people at WSOU. However, they didn't allow us any  
11:51 13 document requests on that or a 30(b)(6).

11:51 14 THE COURT: A response?

11:51 15 MR. SIEGMUND: Yes, Your Honor. I can  
11:51 16 show you exactly what was testified to. So  
11:52 17 essentially, all that the experts are going to say is  
11:52 18 that in the prior license agreements, there was no  
11:52 19 invalidity analysis, there's no infringement analysis.  
11:52 20 It was a blind, hey, would you take an offer of these  
11:52 21 patents? Yes, great.

11:52 22 And that's exactly what our witnesses  
11:52 23 testified to on 30(b)(6), and that's the licensing  
11:52 24 negotiation that we're talking about.

11:52 25 THE COURT: So here's what I'm going to

11:52 1 do at trial.

11:52 2 The plaintiff will be limited -- and I  
11:52 3 think this is fine by your -- in their perspective.  
11:52 4 Plaintiff will be limited to putting on testimony with  
11:52 5 regard to these negotiations that was disclosed during  
11:52 6 discovery. And if it wasn't disclosed during  
11:52 7 discovery, then you can object when they try and put it  
11:52 8 on through their expert.

11:52 9 MR. GARCIA: Your Honor, point of  
11:52 10 clarity. None of this was disclosed during discovery  
11:52 11 because we weren't allowed discovery on this.

11:52 12 THE COURT: Well, they're going to have  
11:52 13 to play it. They're going to have to ask their --  
11:52 14 they're going to have to introduce this evidence at  
11:52 15 trial. And if they ask a question that you were  
11:53 16 prohibited from, approach the bench, and I'll strike  
11:53 17 it.

11:53 18 If they ask -- if Mr. Siegmund is telling  
11:53 19 me that they want to put into evidence what their  
11:53 20 witnesses testified to in their depositions, and if  
11:53 21 they do that, then you have notice of it; if they go  
11:53 22 beyond that, approach the bench, and I will -- I won't  
11:53 23 let them do it.

11:53 24 MR. GARCIA: Thank you for that clarity,  
11:53 25 Your Honor.

11:53 1 THE COURT: MIL No. 2: Plaintiff, its  
11:53 2 experts, and [REDACTED] should be precluded from  
11:53 3 testifying about --

11:53 4 MR. SIEGMUND: This one's agreed, Your  
11:53 5 Honor.

11:53 6 THE COURT: Okay.

11:53 7 MS. YOON: Your Honor, if I may. Rita  
11:53 8 Yoon for Google. I'd like to note our agreement on the  
11:53 9 record as to Motion in Limine No. 2.

11:53 10 THE COURT: Okay.

11:53 11 MS. YOON: We appreciate plaintiff  
11:53 12 confirming last night by e-mail that plaintiff will not  
11:53 13 present third-party witness [REDACTED] at trial in  
11:53 14 the 585 and 580 cases. Plaintiff also confirmed that  
11:54 15 plaintiff will not make any argument, introduce any  
11:54 16 evidence or testimony about any common licensing  
11:54 17 practices or any licensing practices of [REDACTED]

11:54 18 [REDACTED] based on any statements or  
11:54 19 conversations or testimony or evidence from

11:54 20 [REDACTED]

11:54 21 Thank you.

11:54 22 MR. SIEGMUND: And that's correct, Your  
11:54 23 Honor.

11:54 24 THE COURT: Okay.

11:54 25 MS. YOON: Thank you very much.

11:54 1 THE COURT: Next I have No. 3: Any  
11:54 2 reference to purported deficiencies in Google's  
11:54 3 document production or insinuation...

11:54 4 Nothing about discovery comes up during  
11:54 5 trial. That's a rule.

11:54 6 Number -- next one: Plaintiff and its  
11:54 7 experts should be precluded from making any argument or  
11:54 8 reference to issues not addressed...

11:54 9 If it's not in the expert report, it's  
11:54 10 not coming in. So that's granted.

11:54 11 The last one: Plaintiff and its experts  
11:54 12 should be precluded from making any reference to or  
11:55 13 arguments about Google's financials and revenues not  
11:55 14 used in plaintiff's damages calculation.

11:55 15 If it's not in the plaintiff's expert  
11:55 16 report, it's not coming in.

11:55 17 So now let me go ahead and say the  
11:55 18 following. Trial begins October 2nd at 9:00 a.m. You  
11:55 19 are going to have ten hours per side, does not include  
11:55 20 opening or closing. Generally speaking, we go from  
11:55 21 8:30 to 6:00.

11:55 22 When depositions are played, please make  
11:55 23 sure you give to Kristie and our -- my law clerk who  
11:55 24 gets charged for the time.

11:55 25 The charge conference will take place

11:55 1 sometime on Wednesday probably. Y'all -- everyone here  
11:55 2 has been through a charge conference. You know how  
11:55 3 they work.

11:55 4 At the end of plaintiff's case, we will  
11:56 5 take a break. You'll orally make your motion. At the  
11:56 6 end of defendant's case, we'll take a break. Motions.  
11:56 7 At the end of trial, we'll take motions.

11:56 8 Your voir dire will take place on  
11:56 9 September 28th at 9:00 a.m., seven jurors, four strikes  
11:56 10 per side.

11:56 11 Friday, September 29th at 1:30, the  
11:56 12 courtroom will be open for your tech people to come in.

11:56 13 You all know, I think, about the -- how  
11:56 14 to upload things. You've all done the uploading of --  
11:56 15 to JERS.

11:56 16 I'm going to say this just because she  
11:56 17 would kill me if I didn't. For our unbelievably great  
11:56 18 court reporter, Kristie, please turn the mic on every  
11:56 19 time you speak during trial. None of you will, but I'm  
11:56 20 saying this anyway.

11:56 21 Please also directly send her all slides  
11:56 22 and demonstratives by e-mail.

11:56 23 I think you all know this also about how  
11:56 24 insistent I am that -- to go -- about going off and on  
11:56 25 the confidential record.

11:57 1 Finally, I think all of you know all of  
11:57 2 the other -- I don't think there's anything here that  
11:57 3 you all haven't been through with me.

11:57 4 I will -- I'll start with Mr. Siegmund.

11:57 5 Is there any questions from plaintiff?

11:57 6 MR. SIEGMUND: Yes, Your Honor.

11:57 7 On MIL No. 5, I understand the Court's  
11:57 8 ruling, I think just with one caveat. I believe Google  
11:57 9 owes us some supplementation of revenue information  
11:57 10 that we haven't received yet because I think they  
11:57 11 provided it at one quarter in the past and they just  
11:57 12 haven't provided the updated revenue.

11:57 13 But subject to that, obviously, we don't  
11:57 14 have any issue with that ruling. But that's -- we've  
11:57 15 requested that information. They've agreed to provide  
11:57 16 it. We just haven't received it yet. That's all.

11:57 17 THE COURT: Okay. Anything else?

11:57 18 MR. SIEGMUND: And then one other  
11:57 19 question, Your Honor, is on the Court's preferences on  
11:57 20 impeachment by prior deposition testimony.

11:57 21 Are we going with I guess what I would  
11:57 22 call the traditional method of provide the statement,  
11:57 23 walk them through --

11:57 24 THE COURT: Yes.

11:58 25 MR. SIEGMUND: Okay. That's all I needed

11:58 1 to know. Thank you, Your Honor.

11:58 2 THE COURT: Yes, sir.

11:58 3 MR. LOVE: Yes, Your Honor. Just one  
11:58 4 quick question.

11:58 5 We have not conferred on questionnaires  
11:58 6 to submit to the potential jury members, venire panel.

11:58 7 When does the Court need that by?

11:58 8 THE COURT: It'd better be quick, because  
11:58 9 you all's trial's not very far away. If you want to  
11:58 10 get them back, it'd better be pretty quick.

11:58 11 MR. LOVE: Okay. Thank you, Your Honor.

11:58 12 MR. LANIER: Two small questions for us,  
11:58 13 Your Honor. Very small.

11:58 14 One just on scheduling. Your Honor  
11:58 15 referred to voir dire on September 28th at 9:00 a.m.  
11:58 16 Is that the actual voir dire or is that voir dire  
11:58 17 conference that Judge Gilliland sometimes --

11:58 18 THE COURT: That's when you'll be picking  
11:58 19 the jury.

11:58 20 MR. LANIER: Great. Thank you very much,  
11:58 21 Your Honor.

11:58 22 And then there's been a slight dispute  
11:58 23 about the scope of the rebuttal case. Our  
11:58 24 understanding is plaintiff's rebuttal case responds to  
11:58 25 our invalidity case --

11:58 1 (Simultaneous speakers.)

11:58 2 THE COURT: The plaintiff will put on a

11:58 3 rebuttal case to your invalidity case.

11:58 4 MR. LANIER: Thank you, Your Honor.

11:58 5 THE COURT: That's what they'll get to

11:58 6 do.

11:58 7 MR. SIEGMUND: And on that point, Your

11:58 8 Honor, is cross limited to invalidity?

11:58 9 THE COURT: The -- so you're putting on

11:59 10 your invalidity expert?

11:59 11 MR. SIEGMUND: That's correct.

11:59 12 THE COURT: And they are crossing your

11:59 13 invalidity rebuttal expert?

11:59 14 MR. SIEGMUND: Yes. Are they allowed

11:59 15 to --

11:59 16 THE COURT: It's limited to invalidity.

11:59 17 MR. SIEGMUND: Thank you.

11:59 18 MR. LANIER: Understood, Your Honor.

11:59 19 Thank you.

11:59 20 THE COURT: So I thought it was a trick

11:59 21 question.

11:59 22 Anything else?

11:59 23 MR. LANIER: I believe not from us, Your

11:59 24 Honor.

11:59 25 MR. SIEGMUND: Nothing from us, Your

11:59 1 Honor. Thank you.

11:59 2 MR. LANIER: I'm reminded, Your Honor  
11:59 3 didn't give us precise times for opening and closing.  
11:59 4 You've done it before. I don't know if you have it  
11:59 5 this time.

11:59 6 THE COURT: 30 minutes per side --

11:59 7 MR. LANIER: Thank you, Judge.

11:59 8 THE COURT: -- on each.

11:59 9 MR. LANIER: Thank you. No other  
11:59 10 questions from us.

11:59 11 THE COURT: Anything else?

11:59 12 MR. SIEGMUND: No, Your Honor.

11:59 13 THE COURT: Okay. Y'all have a good day.

11:59 14 (Hearing adjourned.)

15

16

17

18

19

20

21

22

23

24

25

1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
3  
4

5 I, Kristie M. Davis, Official Court  
6 Reporter for the United States District Court, Western  
7 District of Texas, do certify that the foregoing is a  
8 correct transcript from the record of proceedings in  
9 the above-entitled matter.

10 I certify that the transcript fees and  
11 format comply with those prescribed by the Court and  
12 Judicial Conference of the United States.

13 Certified to by me this 10th day of  
14 September 2023.

15 /s/ Kristie M. Davis  
16 KRISTIE M. DAVIS  
17 Official Court Reporter  
18 800 Franklin Avenue  
19 Waco, Texas 76701  
20 (254) 340-6114  
21 kmdaviscsr@yahoo.com  
22  
23  
24  
25

11:59